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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1902

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## No. 711

BENJAMIN F. JOHNSON, PETITIONER,

*vs.*

MANHATTAN RAILWAY COMPANY ET AL.

## No. 721

LILLIAN BOEHM, PETITIONER,

*vs.*

MANHATTAN RAILWAY COMPANY ET AL.

---

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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PETITIONS FOR CERTIORARI FILED FEBRUARY 11, 1903.
FEBRUARY 23, 1903

CERTIORARI GRANTED MARCH 30, 1903

(37,408, 37,418)

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IN THE

# DISTRICT COURT OF THE UNITED STATES

## FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.* | IN EQUITY No. E 71-153 |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | IN EQUITY No. E 70-364 |
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY No. E 71-153 |

## Statement Under Rule XIII, Subdivision 4 of the Rules of United States Circuit Court of Appeals for the Second Circuit.

**I. Statement as to the above entitled suit of "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364."**

The suit of The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid

*Statement Under Rule XIII, Subdivision 4 of the Rules of United States Circuit Court of Appeals for the Second Circuit.*

Transit Company, Defendant, In Equity No. E 70-364, was commenced on the 26th day of August, 1932. The American Brake Shoe and Foundry Company was the original plaintiff and Interborough Rapid Transit Company was the original defendant.

Pursuant to the Bill of Complaint and Answer, on August 26, 1932, Victor J. Dowling and Thomas E. Murray, Jr., were duly appointed Temporary Receivers of the property of the defendant Interborough Rapid Transit Company.

On September 1, 1932, J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds were permitted to intervene as such Committee as a party defendant.

On September 1, 1932, J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes were permitted to intervene as such Committee as a party defendant.

On September 1, 1932, Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, as Committee for the Protection of the Holders of Ten-Year Six Per Cent Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company were permitted to intervene as parties in this suit.

On September 6, 1932, Manhattan Railway Company was, by order, made a party defendant and William Rob-

*Statement Under Rule XIII, Subdivision 4 of the Rules of United States Circuit Court of Appeals for the Second Circuit.*

7

erts was appointed Temporary Receiver of the Manhattan Railway Company and its property and assets in this cause.

On September 6, 1932, Van Santvoord Merle-Smith, Walter Bennett, Philip A. Benson, Fred J. Fuller and James Lee Loomis, as the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds were permitted to intervene as such Protective Committee as a party defendant.

8

On September 19, 1932, Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Company, was permitted to intervene as a party in this cause.

On September 28, 1932, on order of the Court, Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913, was made a party to this cause.

On September 28, 1932, Victor J. Dowling and Thomas E. Murray, Jr., were continued as Permanent Receivers of the Interborough Rapid Transit Company, and William Roberts was continued as Permanent Receiver of the Manhattan Railway Company.

9

On September 28, 1932, Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, as the Protective Committee for Manhattan Railway Company Seven Per Cent. Guaranteed Stock, were permitted to intervene as such Protective Committee as a party defendant.

On September 6, 1932, without serving formal notice of appearance, Messrs. Milbank, Tweed, Hope & Webb appeared for The Chase National Bank of the City of New York, as Trustee under the Second Mortgage of the Manhattan Railway Company.

The Bill of Complaint was filed on August 26, 1932.

*Statement Under Rule XIII, Subdivision 4 of the Rules of United States Circuit Court of Appeals for the Second Circuit.*

The Answer of the Defendant was filed on August 26, 1932.

Leave of the Court having been obtained, the Bill of Complaint of Central Hanover Bank and Trust Company, as Trustee, against Manhattan Railway Company, Interborough Rapid Transit Company, Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of the property of Interborough Rapid Transit Company, William Roberts, as Receiver of the property of Manhattan Railway Company, The Chase National Bank of the City of New York, as Trustee under the Second Mortgage of Manhattan Railway Company, and The American Brake Shoe and Foundry Company, Defendants, was filed in this cause on September 28, 1932.

The defendant was not arrested nor was bail taken.

Victor J. Dowling and Thomas E. Murray, Jr., were appointed Temporary Receivers of the property and assets of Interborough Rapid Transit Company on August 26, 1932, and their receivership was continued during the pendency of the cause on September 28, 1932. William Roberts was appointed Temporary Receiver of the property and assets of Manhattan Railway Company on September 6, 1932, and his receivership was continued during the pendency of the cause on September 28, 1932.

No trial has been had.

No question was referred to a Commissioner or Commissioners, Master or Referee.

The date of the entry of the orders of consolidation and of vacation, respectively, now appealed from, was October 18, 1932.

The date of the entry of final decree was October 18, 1932.

The date when the appeals from said orders were respectively taken was October 20, 1932.

*Statement Under Rule XIII, Subdivision 4 of the Rules of United States Circuit Court of Appeals for the Second Circuit.* 13

**II. Statement as to the above entitled suit of Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al, Defendants, In Equity E 71-153.**

The suit of Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al, Defendants, In Equity E 71-153, was commenced on the 21st day of September, 1932. Benjamin F. Johnson was the original complainant and the Manhattan Railway Company, subject to leave of Court granted by order of Hon. Francis G. Caffey, United States District Judge, on September 14
20, 1932, and now appealed from, William Roberts, as Temporary Receiver of Manhattan Railway Company, Interborough Rapid Transit Company, subject to leave of Court, Victor J. Dowling and Thomas E. Murray, Jr., as Temporary Receivers of Interborough Rapid Transit Company, The City of New York, and The American Brake Shoe and Foundry Company were the original defendants.

On September 21, 1932, Lillian Boehm was, on consent of the plaintiff, permitted to intervene as a party plaintiff in the above entitled action.

On September 26, 1932, Nathan L. Amster, Chairman, 15
Morton F. Stern, Hon. Peter Ten Eyck, C. R. Jeffers, Secretary, Blin W. Page, and Charles Franklin, attorney for said Committee, as a Manhattan Railway Common Stockholders Protective Committee, were permitted to intervene as party plaintiffs on behalf of Manhattan Railway Company Common Stockholders Protective Committee.

The bill of complaint filed herein on September 21, 1932.

The supplemental bill of complaint by the complainant Benjamin F. Johnson was filed herein on October 1, 1932.

16 *Statement Under Rule XIII, Subdivision 4 of the Rules of United States Circuit Court of Appeals for the Second Circuit.*

On October 3, 1932, the supplemental complaint of Lillian Boehm, intervenor, was filed herein.

On October 6, 1932, the complainant Benjamin F. Johnson filed his supplemental petition.

No answer has been filed by any of the defendants.

The defendant was not arrested nor was bail taken. No property was attached or arrested.

No trial has been had.

A hearing on the orders of consolidation and of vaca-
17 tion, respectively, which are herein appealed from was held before the Hon. John M. Woolsey, District Judge of the United States District Court for the Southern District of New York on October 6, 1932.

No question was referred to a Commissioner or Commissioners, Master or Referee.

The date when the appeals from each of said orders of October 18th were taken was October 20, 1932.

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**Order Granting Benjamin F. Johnson Leave to File Bill of Complaint.** 19

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
*Complainant,*
*against*

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
*Defendants.*

20

IN EQUITY
E 71-153-1932.

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This cause came on to be heard at this term, and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED AND DECREED as follows, viz.:

1. That the prayer of the petition annexed of Benjamin F. Johnson, verified September 20, 1932, be and the same hereby is granted, and that leave hereby is given to the complainant to file in this Court the bill of complaint mentioned in said petition, with defendants Interborough Rapid Transit Company, and Manhattan Railway Company, and their receivers among the parties defendants thereto.

Dated—New York, September 20, 1932.

FRANCIS G. CAFFEY
U. S. D. J.

## Equity Subpoena.

71—153

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

GREETING:

YOU ARE HEREBY COMMANDED to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by

BENJAMIN F. JOHNSON

and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of Two HUNDRED AND FIFTY DOLLARS ($250).

WITNESS, Honorable JOHN C. KNOX, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 21st day of

September in the year One Thousand Nine Hundred Thirty-two, and of the Independence of the United States the One Hundred and fifty-seventh.

(Sgd) CHARLES WEISER
Clerk.

Charles Franklin,
165 Broadway, N. Y. City.
SOL'T.

The Defendants are required to file their answers or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken PRO CONFESSO.

(Sgd) CHARLES WEISER
Clerk.

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**Petition of Benjamin F. Johnson for Leave to File Bill of Complaint.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

*against*

29 MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

30

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of Benjamin F. Johnson respectfully shows to this Honorable Court:

1. That he is the complainant in the above entitled cause.

*Petition of Benjamin F. Johnson for Leave to File Bill of Complaint.*

2. That Messrs. Victor J. Dowling and Thomas E. Murray, Jr., were appointed receivers on or about August 26, 1932, of the above-named Interborough Rapid Transit Company; and that William Roberts was appointed receiver on or about September 6, 1932, of the above-named defendant Manhattan Railway Company.

3. That upon information and belief, the order appointing such receivers contains certain restraining provisions among them restraining the institution or prosecution of suits against the Interborough Rapid Transit Company and Manhattan Railway Company aforesaid.

4. That your Petitioner respectfully begs leave of this Court to make the Interborough Rapid Transit Company and Manhattan Railway Company, parties defendants in this suit and that the receivers above-named of said Interborough Rapid Transit Company and of said Manhattan Railway Company also be joined as parties defendants upon the grounds set forth in the bill filed in this cause.

WHEREFORE, your petitioner prays leave of this Honorable Court to file its said bill of complaint and to include among the parties defendants thereto said Interborough Rapid Transit Company and Manhattan Railway Company, and said receivers, and that an order granting such relief may be made by this Honorable Court, and entered in the above-entitled cause.

*Petition of Benjamin F. Johnson for Leave to File Bill of Complaint.*

And your petitioner, as in duty bound, will ever pray, etc.

Dated, September 20, 1932.

BENJAMIN F. JOHNSON,
By (Sgd) CHARLES FRANKLIN
Solicitor.

(Signed) CHARLES FRANKLIN
Solicitor for Petitioner,
Office and Post Office Address,
165 Broadway,
Borough of Manhattan,
New York City.

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## Bill of Complaint of Benjamin F. Johnson.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON,<br>Complainant,<br><br>*against*<br><br>MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,<br>Defendants. | IN EQUITY<br>E 71-153<br>1932 |

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TO THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

Complainant brings his Bill of Complaint against the above-named defendants, and respectfully alleges the following:

(1) Complainant is a resident of Winchester, Kentucky, and is a citizen of the State of Kentucky, and is the record holder of one hundred (100) shares of the defendant Manhattan Railway Company (hereinafter called Manhattan), having a par value of $10,000.00.

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(2) On information and belief, that the defendants Manhattan Railway Company and Interborough Rapid Transit Company (hereinafter called Interborough), are railroad corporations, and were at all times hereinafter mentioned, and are now, corporations duly organized and existing under and by virtue of the laws of the State of New York, and are citizens of said State, having their principal offices in the City of New York, in the Southern District of New York. That the defendants Victor J. Dowling and Thomas E. Murray, Jr., are citizens and residents of the State of New York, and were appointed
41 temporary receivers of the defendant Interborough by an order of Honorable Martin T. Manton, U. S. Circuit Judge, on August 26, 1932, on a bill (E. 70-364) filed in the office of the Clerk of this Court; that the defendant, William Roberts, is a citizen and resident of the State of New York, and was appointed temporary receiver of the defendant Manhattan by order of Honorable Martin T. Manton, U. S. Circuit Judge, on September 6, 1932, said appointment having been made on petition of intervention in said suit (E. 70-364). That the defendant American Brake Shoe and Foundry Company is a foreign corporation created and existing under the laws of the State of Delaware, and is made a party defendant on
42 account of its interest in the subject-matter of this suit.

(3) That this is a suit of a civil nature in equity; that the matter in controversy exceeds the sum or value of Five Thousand Dollars, exclusive of interest and costs, and is between citizens of different states.

(4) This action is brought by the complainant in his derivative capacity as a minority stockholder of Manhattan, in its own behalf and in behalf of such other stockholders of Manhattan as may join herein and become

parties hereto (by leave of Court) for the benefit of Manhattan. The bill of complaint herein brought by the complainant as a stockholder of Manhattan is founded upon rights which may properly be asserted by Manhattan. The complainant was a shareholder of Manhattan at the time of the transactions complained of herein. This suit is not a collusive one to confer on a Court of the United States the jurisdiction of a cause of which it would not otherwise have cognizance, and is instituted in good faith for Manhattan's benefit.

(5) Complainant believes and therefore avers that there is imperative need for setting aside the appointments of said receivers, Dowling, Murray and Roberts, and for the appointment of independent receivers under properly constituted authority for the Manhattan Railway Company, and for the Interborough Rapid Transit Company, upon the grounds more particularly set forth herein at length. 44

(6) That the appointment of said receivers, as aforesaid, is believed to have been irregular, without warrant or legal authority, and void, as in violation of the effective rules, practice and procedure in the United States District Court for the Southern District of New York. It is believed that the Honorable Martin T. Manton, U. S. Circuit Judge, assumed, without any legal right or any necessity therefor, the rights, powers and privileges of the United States District Court, to appoint receivers in equity causes for the Interborough, as well as for the Manhattan Railway Company; that the governing rules of this Court duly promulgated and duly published which were violated and contravened in the appointment of said receivers as aforesaid, reads as follows: 45

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*"United States District Court—Southern District of New York.*

Matter of the Revision of the General Rules of this court by adding thereto Rule 1-a and Rule 11-a.

Due deliberation having been had, it is ordered that, effective July 1, 1932, the following rule, to be designated as 1-a, shall be and become a General Rule of this court, to wit: '1-a. Any judge designated to sit in the District Court for the
47 Southern District of New York, shall do such work only as may be assigned to him by the senior district judge.'

And also effective as of July 1, 1932, the following rule, to be designated as 11-a, shall be and become a General Rule of this court, to-wit: '11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy Rules), shall be made to the judge assigned to hold the Bankruptcy and Motion Part of the business of the court and to no other judge."
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Dated, June 30, 1932.

JOHN C. KNOX
HARRY W. GODDARD
WILLIAM BONDY
FRANK J. COLEMAN
JOHN M. WOOLSEY
FRANCIS G. CAFFEY
ALFRED C. COXE
ROBERT P. PATTERSON
United States District Judges."

(7) Complainant is informed and believes, and therefore avers, that at the time of the application for the appointment of receivers for the Interborough, namely, on August 26, 1932, and at the time of the application for the appointment of receivers for the Manhattan, namely, on September 6, 1932, there was a United States District Judge duly assigned and sitting in the Motion Part of the Court, as well as other District Judges of the United States District Court who were ready, able and willing to entertain the applications for equity receivership of said Interborough and Manhattan. 49

(8) Complainant is informed and believes, and therefore avers, that at the time of the said applications for the appointment of receivers of Interborough and Manhattan, there was no disagreement between the District Judges of the said United States District Court, but said Judges were in entire agreement upon the division of business, and for the assignment of cases for trial, and have ever so continued; that the above quoted rule was duly adopted, approved, signed and published by each of the eight United States District Judges in the said Court. 50

(9) That the above quoted rule was not revoked or abrogated at the time of the appointment of said receivers but was then and now is in full force and effect, and that the District Judge assigned to the Motion Part did not refuse to act upon the applications of Interborough and Manhattan for receivers. 51

(10) Complainant is informed and believes, and therefore avers, that Circuit Judge Manton in making the said appointments and in taking action on the bill of complaint and on the intervention of the Manhattan Railway Company in said cause, unlawfully usurped the

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duties and functions of the Judges of this Court without legal warrant or any justification.

(11) Upon information and belief, that either the complainant in the Interborough suit, or one of the defendants, or intervenors therein, disregarding the effective rule, practice and procedure in such cases made and provided, and without cause or warrant therefor, prepared or caused to be entered, two separate orders dated August 25, 1932, as follows, both of which orders are believed to be irregular, unlawful and improper, and
53 without necessity or any justification therefor, namely:

"WHEREAS, the undersigned as Senior Circuit Judge of the Second Judicial Circuit of the United States, is impowered and authorized by law, pursuant to the provisions of Title 28, Sec. 22 of the Code of Laws of the United States of America, if the public interest so requires, to designate and assign any Circuit Judge of the Second Judicial Circuit to hold a District Court within such Circuit; and

WHEREAS, the undersigned, as such Senior Circuit Judge, finds that the public interest requires
54 that Martin T. Manton, a Circuit Judge of the Second Circuit, be designated and assigned as a Circuit Judge of this Judicial Circuit to hold a District Court within such Circuit, it is hereby

ORDERED, ADJUDGED AND DECREED, that the said Martin T. Manton be and he hereby is designated and assigned to hold a District Court of the United States for the Southern District of New York, Second Judicial Circuit, during the period beginning August 25, 1932 and particularly to hear

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and determine all applications and proceedings in the matter entitled, American Brake Shoe and Foundry Company *vs.* Interborough Rapid Transit Company, and for such further time as may be required to complete unfinished business.

Dated, New York, August 25, 1932.

MARTIN T. MANTON
Senior Circuit Judge for the
Second Judicial Circuit."

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(11-a) Complainant is informed and believes, and therefore avers, that there was complete unity of thought and action on the part of the District Judges of this Court in relation to the Court Rule hereinabove quoted. That so far as complainant knows, there is no prohibition in effective Rules against the appointment of individuals as receivers in equity causes in proper cases, especially where special application is made therefor.

That no such application was made to the District Judge holding the motion part, and that there was no occasion or necessity for designating an additional or other District Judge to hear and act upon the application for the appointment of receivers of the Interborough, in addition to the District Judge sitting in the Motion Part at the time said application was made. That there was no question of public interest involved which called for the designation of an additional District Judge to sit in the equity suit entitled, American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company; in fact, complainant believes, and therefore avers, that the public interest plainly required full and complete compliance with the effective Rules, Practice and Procedure of this Court on account of the vast and important financial obligations involved.

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The other order entered by said Circuit Judge on the same day (August 25, 1932), and filed in the office of the Clerk of this Court, reads as follows:

"In the United States Circuit Court
of Appeals
Second Judicial Circuit.

| | |
|---|---|
| In the Matter of the Division of Business and Assignment of Cases for Trial in the Southern District of New York. | Order |

59

Whereas, Martin T. Manton has been duly designated and assigned to hold a District Court of the United States for the Southern District of New York within this Second Judicial Circuit for a period of thirty days from this day; and

Whereas, Section 23 of the Judicial Code (March 3, 1919, c 231, sec. 23, 36 Stat. 1090) provides that 'In districts having more than one district judge, the judges may agree upon a division of business and assignment of cases for trial in said district; but in case they do not so agree, the Senior Circuit Judge of the Circuit in which the district lies shall make all necessary orders for the division of business and the assignment of cases for trial in said District'; and

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Whereas, Martin T. Manton, a Circuit Judge of the Second Judicial Circuit of the United States designated and assigned to hold a District Court

in the Southern District of New York in said Circuit, and acting as District Judge for the Southern District of New York in this Second Judicial Circuit, does not agree upon the division of business and assignment of cases for trial in the Southern District of New York, as provided in and pursuant to the rules of court for the Southern District of New York, heretofore adopted by the then United States District Judges for the Southern District of New York; it is hereby

ORDERED, ADJUDGED AND DECREED that, for a 62
period of thirty days beginning with this day, all applications for the appointment of receivers in equity causes in the Southern District of New York may be made not only to the District judge designated to hear such application pursuant to Rule 11-a of the General Rules of the District Court for the Southern District of New York, but also to Martin T. Manton, Circuit Judge designated to act as District Judge to hold a District Court for the Southern District of New York.
Dated, New York, August 25, 1932.

MARTIN T. MANTON." 63

(12) Your complainant is informed and believes, and therefore avers, that the above designation and order are each irregular, improper, without legal warrant or justification, and void; moreover, that the action taken by Honorable Martin T. Manton in appointing the aforesaid receivers for Interborough and Manhattan were and are likewise irregular, improper and void, and that all orders made and the action taken by said Circuit Judge subsequent to the filing of the equity bill of the Inter-

borough are likewise null and void, as in violation of the rules, practice and procedure of this Court, and because said Circuit Judge lacked jurisdiction to entertain said receivership applications, and to make any orders, or to appoint said receivers, or to take any action whatever upon said bill, and therefore there is grave danger that in the near future, if not now, all of the proceedings taken by the Circuit Judge, and all of the action taken by the temporary receivers appointed as aforesaid will be set aside and declared to be null and void and of no effect, to the great detriment of complainant and of the creditors and security holders of the Interborough and Manhattan, with resulting irreparable damage to said parties, including complainant.

(13) That the interests involved and which are and will be affected by the irregular void and unlawful and improper action taken on the American Brake Shoe and Foundry Company bill (E. 70-364), and on the intervening bill of Manhattan, and of other intervenors, are so vast, and the certain likelihood of irreparable loss and damage is so great that this Court is importuned to direct a hearing in this cause at the earliest opportunity to insure against unnecessary loss and damage until the errors, irregularities and the jurisdictional defects hereinabove cited are properly cured. Complainant avers, there is involved in the Interborough and Manhattan receiverships, the rights of holders of First and Refunding Mortgage bonds of the Interborough dated March 20, 1913, to Guaranty Trust Company of New York as Trustee, under which there are now issued and outstanding in the hands of the public bonds to the principal amount of more than One Hundred and Thirty-two Million ($132,000,000.) Dollars, and under which there are now outstanding bonds to the additional amount of more than Fifty-four Million ($54,000,000) Dollars, pledged to

secure an issue of Ten Year Secured Convertible 7% Gold Notes of the said Interborough, due September 1, 1932, of which there are outstanding in the hands of the public notes to the principal amount of Thirty-one Million, Six Hundred and Seventy-two Thousand One Hundred ($31,672,100.) Dollars; that there are also issued and outstanding in the hands of the public Interborough's Unsecured Ten Year 6% Gold Notes due October 1, 1932, in the principal amount of Ten Million Five Hundred Thousand ($10,500,000.) Dollars; that interest on said First and Refunding Mortgage 5% Gold Bonds of the Interborough is due and payable on the first days of 68 January and July in each year; that interest on said Ten Year Secured Convertible 7% Gold Notes is due and payable on the first days of March and September in each year; and that interest on said Unsecured Ten Year 6% Gold Notes is due and payable on the first days of April and October in each year; also Seven percent (7%) per annum on the authorized and outstanding capital stock of said Manhattan Railway Company to the aggregate par value of Sixty Million ($60,000,000.) Dollars, payable quarterly to the owners of record of the shares of said stock, on the first days of January, April, July and October in each year, but as to 556,490 shares of said 69 capital stock the dividend rental rate has been reduced to 5% per annum, payable if earned; also Four percent (4%) per annum on the Consolidated Mortgage 4% Bonds of said Manhattan Railway Company of which Forty Million Six Hundred and Eighty-three Thousand (40,683.000.) Dollars, are now outstanding, payable semi-annually on the first days of April and October in each year; also Four percent (4%) per annum on the Second Mortgage Bonds of said Manhattan Railway Company of which Four Million Five Hundred and Twenty-three Thousand ($4,523,000.) Dollars, are now outstanding.

payable on the first days of June and December in each year.

(14) Your complainant is informed and believes, and therefore avers, that there is special and imperative need for having receivers for the Interborough and Manhattan who are independent and disconnected with the old management of said companies in order to insure adequate protection to their interests and that the appointment of the receivers aforementioned, as well as continuance in office of the President and General Manager of the Interborough, and the continuance in office of
71 the President and Counsel of the Manhattan, as receiver, or otherwise, does not and will not insure independence of action or protection, either of the Interborough or Manhattan creditors and security holders.

(15) Your complainant further avers, upon information and belief, that the designated attorneys for the receivers of Interborough, was the firm with whom Victor J. Dowling was associated at the time of his appointment as receiver; that said law firm, or certain members thereof, were and for years have been closely associated with the Brooklyn-Manhattan Transit Company, and during the period of one year prior to the date of August 26,
72 1932, said firm has directly or indirectly had professional and other connection with the subject-matter of this suit, and with the defendant Interborough, the Brooklyn-Manhattan Transit Company, and other persons interested in the cause or interested in the receivership estate. The Brooklyn-Manhattan Transit Company owns a large number of shares of Interborough, and its chairman of the board is also chairman of the board of the Interborough, while the companies also have common directors on the Brooklyn-Manhattan Transit Company, Interborough and Manhattan. That the Brooklyn-Manhattan Transit Company has never been favorable to Interborough, and even less so to Manhattan.

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(15-a) That on August 29, 1932, a bill was filed together with an order to show cause returnable September 6, 1932, in the District Court for the Southern District of New York, entitled Harry Barber *vs.* Manhattan, Interborough, et al, wherein the plaintiff Harry Barber asked that a receiver be appointed for the Manhattan. That prior to said August 29, 1932, no proceeding, suit or action was instituted for the appointment of a receiver for Manhattan. That said bill was duly filed on August 29, 1932, and is now on file in the office of the Clerk of this Court. That on the return day of the said order to show cause, namely, September 6, 1932, and before the 74
time set for hearing thereon, it was announced by said Circuit Judge that William Roberts had been appointed temporary receiver of Manhattan by extending the American Brake Shoe and Foundry Company *v.* Interborough receivership over said Manhattan. That no action was taken by said Circuit Judge on the Barber bill of complaint, which was disregarded; that said appointment of William Roberts was made without the knowledge of any of the moving or intervening parties to the Barber bill and without any opportunity to be heard thereon. Petitioners believe said appointment of William Roberts was irregular, unlawful and improper.
The appointment by said Circuit Judge Manton of William Roberts, as receiver, before the Barber order to 75
show cause was formally heard on September 6, 1932, deprived the Manhattan security holders of a fair and impartial opportunity to be heard on the advisability of an absolutely and distinctly separate and independent receivership insofar as Manhattan interests were and are concerned.

(16) That said William Roberts was and is the President and Counsel for the Manhattan Railway Company, and it is believed that his appointment was sponsored and made at the instance of the Brooklyn-Manhattan

Transit Company-Interborough interests, and not at the instance or sponsorship of complainant or any of the other stockholders of Manhattan. Complainant believes, and therefore avers, that said appointment of William Roberts was irregular and improper. Moreover, that there is an urgent need of the appointment of a receiver for Manhattan who is familiar with the operating end of the elevated lines, and one who is independent, without connection with or domination by Interborough and/or Brooklyn-Manhattan Transit Company. Complainant believes that such independent receiver or re-
77 ceivers should be one well experienced in the operation of traction companies, as well as one thoroughly familiar with receiverships and reorganizations, and well grounded on finance and in the financial set up of Manhattan.

(17) That your complainant avers that petitions for intervention were filed in the Barber suit, the same having been consented to by the attorney for said Barber therein, but inasmuch as said Circuit Judge declined to take any action upon the equity bill filed in the Barber cause, except to order the same filed with the Clerk of this Court, the said petition of intervention was not
78 allowed, or filed in this Court.

(18) That there is further urgent necessity for the immediate appointment of new and independent receivers of Manhattan upon the grounds hereinafter set forth.

That Manhattan is a corporation organized and existing under the laws of the State of New York, owns a system of elevated railroads in the Boroughs of Manhattan and the Bronx in the City of New York, which system of railroads Manhattan leased to the Interborough for the term of 999 years from November 1, 1875, under the terms of conditions and for the rentals in said indenture of lease set forth. The lease includes four main parallel lines extending generally in a northerly and

southerly direction through the Boroughs of Manhattan and Bronx, in the City of New York, as follows:

Second Avenue Line, extending from Chatham Square along Allen Street, First and Second Avenues to 129th Street and Second Avenue;

Third Avenue Line, (including the so-called Suburban Line), extending from South Ferry in the Borough of Manhattan, along Pearl Street, the Bowery, Third Avenue to Pelham Bay Road in the Bronx, with an additional main line extending from Park Row at City Hall to Chatham Square and a branch known as the 34th 80
Street Branch, extending from Third Avenue and 34th Street to the East River;

Sixth Avenue Line, extending from Morris Street along Church Street, West Broadway, Sixth Avenue and West 53rd Street to a connection with the Ninth Avenue Line at Ninth Avenue and 53rd Street;

Ninth Avenue Line, extending from South Ferry, in the Borough of Manhattan, along Greenwich Street, Ninth Avenue, West 110th Street, Eighth Avenue and over the Harlem River and partly over a private right of way to a connection with the City-owned Lexington Avenue Subway Line at Jerome Avenue and 162nd 81
Street.

(19) On March 19, 1913, Public Service Commission issued a certificate to Manhattan, known as the "Manhattan Certificate" to construct additional or third tracks upon the Second Avenue Line, Third Avenue Line and Ninth Avenue Line for the entire distances along said lines as hereinabove described. Pursuant to the terms of the Certificate, the franchise for the third tracks is for a period of eighty-five (85) years at the expiration of which time the third tracks revert to the City of New York. The remaining tracks or lines are owned by Man-

hattan in perpetuity. Interborough claims to have constructed the third tracks and enlarged power station of Manhattan out of its own funds and to have expended in the construction of the third tracks sums variously estimated from Twenty-seven Million ($27,000,000.) Dollars to Forty Million ($40,000,000.) Dollars.

(20) In and by the aforesaid lease, the Interborough as lessee, covenanted and agreed that it would each and every year during the term of the lease of June 1, 1906, pay to Manhattan, as lessor, as rent for the demised
83 property, annual dividends at the time specified in the lease at the rate of 7% per annum on the shares of stock of Manhattan.

(21) That the Interborough, as lessee, covenanted and agreed to pay to the lessor, as rental, as the same became due the interest on the outstanding bonds of Manhattan.

(22) The Interborough, as lessee, covenanted and agreed that it would pay and discharge the rent as and when the same became due and all taxes, assessments and charges whatsoever levied, assessed or imposed upon the Manhattan as lessor, its capital, or shares of capital
84 stock, or dividends, or upon the demised railroad premises, real estate, personal property, franchises, assessments, or any part thereof, or the business, earnings or income of the lessor, or for the use or enjoyment thereof by the United States, State, Municipal, or other lawful authority.

(23) At the time the receivers were appointed for Interborough on August 26, 1932, there was outstanding the following securities of Manhattan required to be paid by Interborough under the terms of the lease:

> $40,683,000. principal amount of Consolidated Mortgage 4% Bonds, issued under and pursuant

to and secured by an indenture dated February 26, 1890, and a supplemental indenture dated June 13, 1899, between Manhattan and Central Trust Company of New York (now Central Hanover Bank and Trust Company), whereby there is mortgaged all of the railroad properties and certain other properties of Manhattan.

$4,523,000. of Second Mortgage 4% Bonds, issued under and pursuant to and secured by an indenture dated January 1, 1913, between Manhattan and the Equitable Trust Company (now the Chase National Bank of the City of New York) whereby there is mortgaged all of the railroads properties and certain other properties of Manhattan, but subject to the lien created by said indenture to Central Trust Company of New York (now Central Hanover Bank & Trust Company). 86

600,000 shares of the capital stock of the par value of $100.

(24) On May 1, 1922, a voluntary "Plan of Readjustment" was made in and by which it was provided that as to all holders of the capital stock of Manhattan who should assent to the Plan of Readjustment, the 7% annual rate of guaranteed dividend rental on such capital stock as fixed in the aforesaid lease from Manhattan to Interborough should be reduced subject to the terms and conditions of the Plan of Readjustment to the rate of 5% per annum after July 1, 1924, with the provision that in any fiscal year in which either the net earnings of the Interborough or the net earnings of the Manhattan leased line, as defined in the Plan of Readjustment, would be sufficient to pay the whole of said guaranteed dividend rental, the Interborough should pay and distribute as provided in the aforesaid lease on account of said dividend rental an amount equal to the net earnings of the Interborough Company or the net earnings of the Manhattan leased lines, whichever amount should be the larger. 87

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(24-a) The complainant has made no demand upon the officers and directors of this corporation to institute proceedings for the relief herein sought for the reason that a great emergency exists for the immediate appointment of receivers of Manhattan upon the grounds that the receivers appointed for Interborough are appropriating the revenues from Manhattan on behalf of Interborough and are making no payments therefrom to Manhattan; that Manhattan has no funds of its own to meet obligations already due and owing, nor has it funds to meet payments to its bondholders which are presently
89 to become due and owing; that with such a condition Manhattan may be forced to terminate its lease with Interborough forthwith and attempt to operate its own road; that in such event, it will have no funds with which to carry on such operation; that the continued operation of through trains from the Manhattan tracks to the Interborough tracks and vice versa may be disrupted; that the public service may and is likely to become seriously impaired and endangered; that with the uncertainties which have arisen in the minds of the public and among the employees of Interborough and Manhattan, grave danger is apt to arise in connection with the operation of the high speed trains and the rapid transit conducted by both
90 roads; that assurances should be given to the public and employees of both roads forthwith that the operation of Manhattan as well as Interborough will continue as heretofore and that the roads operations will be under the exclusive jurisdiction of and direction of this Court; that no demand has been made upon the further grounds that Interborough having admitted in its answer that it is unable to meet the obligations due and owing from it to Manhattan and will be unable to meet the obligations due and becoming due from Interborough to Manhattan, various actions are likely to be instituted in different jurisdictions, including foreclosure actions and suits by stock-

holders and bondholders; that such actions will result in great confusion and complication and will endanger not only the rights of parties financially interested in Manhattan, but will cause great inconvenience and perhaps danger to the public as well; that this Court should forthwith take immediate jurisdiction of Manhattan so that exclusive control of the operation of both roads and the through and connecting lines of both roads shall be vested under one authority.

(24-b) Upon information and belief, as several of the directors of Interborough are also directors of Manhattan, and as heretofore alleged, three of the directors of 92
Interborough constitute three of the four members of the Executive Committee of Manhattan; that the interests of these directors are conflicting and that it is impossible for such directors, particularly those controlling the executive committee of Manhattan to act independently and adequately and fully to protect the rights of Manhattan as against Interborough when acting in such dual position; that various questions of the rights of Interborough and Manhattan must necessarily arise, particularly as to operating and maintenance costs and revenues, in connection with the operation of through trains from one line to the other; the determination and apportionment of 93
compensation to employees engaged in through train operations, the determination of the rights of Manhattan and Interborough on the extra trackage built by Interborough on Manhattan's roads and questions arising with respect to the liability of Interborough to Manhattan because of breaches of the lease by Interborough; the fixing of the rights of Manhattan as against Interborough in the event of unification, consolidation or merger of both roads; and the immediate determination by the Court acting upon the advices of independent receivers of both companies as to the proper disposition and allocation of the revenues received by the receivers in the operation of

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Manhattan and Interborough; the determination as to what sums it shall be just and proper for the receivers of Interborough to pay to Manhattan's receivers; that such apportionment can best be done by having one jurisdiction over both properties.

(24-c) Complainant further avers upon information and belief, that the orders appointing receivers for the Interborough and Manhattan are void and of no effect whatsoever; that the acts of said receivers acting in a *de facto* capacity are likewise illegal, void and of no
95 effect; that the acts of such *de facto* receivers heretofore done and about to be done have created and will continue to create serious disputes involving the legality of their acts, thereby creating doubt and confusion as to the effect of all the action taken by them.

(25) It is the allegation of your complainant supported by Manhattan that the earnings of Manhattan or Interborough have been sufficient to make such payments and that a proper audit and accounting of Interborough's books and records and of the books and records kept by Interborough as to the operation of the Manhattan lines would prove your complainant's allegation.

96 (26) Your complainant alleges that the Interborough bondholders have no lien whatsoever upon the third tracks of the Manhattan and is supported in that allegation by the then counsel for the Manhattan stockholders' committee, Messrs. Murray, Prentice & Aldrich. It is your complainant's contention and it so alleges that the third tracks have become affixed to the property owned in fee by Manhattan, that such tracks were not subject to any claim of Interborough or its creditors or bondholders and that said trackage is subject (if it is subject at all) to the first or second Manhattan mortgages or both. Your complainant further alleges that if the lease between Manhattan and Interborough is disaffirmed or rejected by the receivers of Interborough all improvements and bet-

terments made by Interborough as lessee upon Manhattan's property inure to the benefit of the lessor as provided in paragraph numbered "ARTICLE TWENTY-FIRST" of the lease reading as follows:

> "ARTICLE TWENTY-FIRST: The Lessee further covenants and agrees that in case of default by it in the payment of the cash or dividend rentals in this lease reserved and agreed to be paid, and if said rentals, or any part thereof, shall remain unpaid for the space of ninety days from and after the time when they shall become due and payable, or if the said Lessee shall be in default in the performance of any of the covenants or agreements in 98
> this Lease contained and on its part to be kept and performed as aforesaid, and such default shall continue for the period of ninety days after notice and demand of performance by the Lessee, given in writing by the Lessor to the Lessee, or if the Lessee shall fail or refuse to comply with any decision of arbitrators appointed as herein provided, for sixty days after service of notice of such decisions upon it, *then and in any of said events, the term by this lease created, granted and demised shall at the option of the said Lessor expire and cease and determine, and the Lessor shall have the right to enter upon and take possession of all and singular the property by this lease granted and demised,* 99
> *and the same have and possess and enjoy as of its former estate, and without such entry may recover possession thereof in the manner provided by statute, by summary proceedings; it being covenanted and agreed that the term hereby granted shall expire after continued default as aforesaid, at the election of the Lessor and upon written notice of such election being served on the Lessee, and that all right of any further demand or reentry other than that above specifically referred to is hereby waived by the Lessee. The foregoing remedies are cumulative and shall not be construed to take away or abridge any other remedy, or right existing by law, or under any other provision of this Lease."* (Italics ours).

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(27) Taxes in excess of $860,000. against the special franchises and real estate belonging to the Manhattan have become due and are now unpaid. In the complaint of American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company, filed August 26, 1932 (paragraph 13) it is alleged as follows:

> "On information and belief, that the defendant has neglected and failed to pay certain taxes for 1932 duly assessed by the City of New York against the special franchises and real estate belonging to the Manhattan Railway Company, the amount of
101 such taxes with interest now due thereon being in excess of $860,000.; that defendant lessor Manhattan Railway Company has formally demanded in writing that such taxes be paid, but that the defendant has neglected and failed, and continues to neglect and fail to comply with such demand and make such payments; on information and belief that the failure and such refusal constitutes an act of default on the part of defendant under the aforesaid lease of Manhattan Railway Company, and if continued for a period of 90 days from the date of demand of the Manhattan Railway Company, will constitute an additional act of default under the terms of the First & Refunding Mortgage."

102 The foregoing allegation of the complaint is admitted by the answer thereto.

(28) In said American Brake Shoe and Foundry Company complaint (paragraph 15), it is alleged on information and belief that the defendant is and will be without financial resources to meet in full certain contractual obligations which are required of it by the terms of said mortgage, the indenture securing its notes and the lease of Manhattan which included the following:

> "Rental payments due under the lease from Manhattan Railway Company amounting to $914,802.50 on October 1, 1932, being interest on the

Manhattan 4% Bonds and rental for one-quarter on the non-assenting 7% stock of the Manhattan Company."

"Rental payments due under the said Manhattan lease on December 1, 1932, amounting to $90,460."

The foregoing allegation of said American Brake Shoe and Foundry Company's complaint is admitted by the answer thereto.

(29) In each of the two mortgages of Manhattan securing its outstanding bonds, there are provisions that, 104
on defaults in the payments of interest on the outstanding bonds and the continuance of such defaults for short period respectively, set forth in the said respective mortgages, proceedings may be instituted by the Trustees, respectively, named in the respective mortgages, and shall be instituted by the Trustees, respectively, upon the request of a specified number of holders of bonds secured by such mortgages, respectively, to foreclose the liens of the respective mortgages.

(30) The Interborough by the terms of the aforesaid lease agreed to pay interest on the bonds of Manhattan as it became due. Manhattan has no resources with which 105
to meet the interest on the mortgage indebtedness of its system of elevated railroads leased to Interborough, or to meet the other indebtedness or liability of Manhattan, other than the rentals payable under the lease made by Manhattan to Interborough as part of which said Interborough agrees to pay such fixed charges and such rentals and to perform the other covenants therein contained.

(31) The complainant alleges that Manhattan is in a very precarious position at this very moment because of the default by Interborough as lessee in the payment of real estate and franchise taxes owing by Manhattan on

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its properties and which Interborough under its lease is required to pay as part of its rent to Manhattan.

(32) The complainant further is informed and believes, and alleges, that the Interborough has definitely stated the interest will not be paid to the Manhattan 4% bondholders on October 1, 1932.

(33) With the uncertainty as to the future of Interborough, now in receivership, and its claim that its present plight is due to losses incurred from the operation of the Manhattan lines and the frequent appearing state-
107 ments in the press and elsewhere that to save itself Interborough must cut loose from the Manhattan lines, there is grave danger that the Manhattan first or second mortgage bondholders, or both, will promptly declare the entire Manhattan mortgage indebtedness of approximately Forty-five Million ($45,000,000) Dollars due and payable and institute foreclosure or take possession of Manhattan's properties, in spite of the present receiverships of Interborough and Manhattan.

(34) That there is a grave and dangerous possibility of said receiverships of Interborough and Manhattan being set aside, inasmuch as Circuit Judge Martin T. Man-
108 ton had no power or jurisdiction to entertain said receivership proceedings, as was heretofore more fully set forth. That if the foreclosing mortgagees upon default in the payment of their interest on October 1, 1932, elect to foreclose, as they unquestionably will in order to set aside the present receiverships of Interborough and Manhattan because of the said irregularity, nullity and voidness in the procedure of obtaining said Interborough and Manhattan receivers, the Manhattan stockholders will be placed in a very dangerous, precarious and questionable position.

(35) If the Trustees or bondholders should set aside the Interborough and Manhattan receiverships on the

aforementioned grounds and institute foreclosure proceedings in the State Court and procure the appointment of receivers, hopeless confusion and chaos will result with various acts and receivers making over-lapping claims or seizing properties perhaps belonging to the other receivers, claiming the protection of the Court which appointed them and refusing to submit to the jurisdiction of the Court of the opposing receivers. The injury, damage and the inconvenience to the travelling public which has to use both lines will be incalculable and shameful. Such a possibility should not be tolerated by this Court or any other Court for a single instance and the possi- 110
bility of such a condition should be and can be removed at once by the immediate setting aside of the application and appointment of Victor J. Dowling and Thomas E. Murray, Jr., receivers of Interborough, and William Roberts, receiver for Manhattan, and by the proper presentation of a petition for receivers for Interborough and Manhattan before a District Court Judge for the Southern District of New York, having the recognized and proper jurisdiction to entertain such applications and make appointments of receivers thereof.

(36) There are further and very serious problems arising out of the Interborough-Manhattan receiverships 111
which require this Court to immediately nominate and properly appoint a new and independent receiver of Manhattan who is not only experienced in the intricate problem of the financial affairs of Manhattan but who is also experienced in the operation of said Manhattan lines.

(37) It is most essential that an accounting be had at once between the Interborough and Manhattan. At the present time questions arising daily as to what portion of the operating expense of the Interborough and Manhattan lines should be borne by Manhattan; similarly what portion of the revenue received through operation

over Interborough and Manhattan lines should be received by Manhattan; again the question arises what charge should be made to Interborough for the use of electricity from Manhattan's power stations. These questions should not be left to the determination of the Interborough receivers. Independent, new and proper representatives should be appointed by this Court to protect the rights of Manhattan on all such questions. It is reported that the revenue from the Manhattan lines is mingled with the revenue from the Interborough lines. Question arises whether these funds must not now be held
113 by the receivers for the benefit of Interborough creditors. Tracing Manhattan's revenues and segregating them from a common fund is an almost impossible task, unless an independent Manhattan receiver, well acquainted with transit finances, is placed in a position to receive all said moneys, rents and profits for Manhattan. It is respectfully prayed that the Court should take immediate action to segregate Manhattan's revenue from the funds of Interborough's receivers. Proper, new and independent receivers appointed for Manhattan will afford that protection to which Manhattan, its stockholders and bondholders are immediately entitled.

114 (38) The reports of the Interborough for the operation of the Manhattan lines and extensions show a steadily mounting deficit for the past eight (8) years totalling about Nineteen Million ($19,000,000.) Dollars as follows:

| | |
|---|---|
| For the year 1925, loss.... | $1,244,673. |
| For the year 1926, loss.... | 792,454. |
| For the year 1927, loss.... | 1,604,869. |
| For the year 1928, loss.... | 2,922,069. |
| For the year 1929, loss.... | 2,868,173. |
| For the year 1930, loss.... | 2,682,677. |
| For the year 1931, loss.... | 3,492,807. |
| For the year 1932, loss.... | 3,500,000. (estimated) |

Of this amount approximately Ten Million ($10,000,000.) Dollars is an indebtedness upon Manhattan's Modified 5% stock the dividends of which are cumulative. No dividends have been paid on the Modified Stock for over three and one-half years. In addition, Interborough claims that it must set aside annually the sum of $3,185,000. for interest and sinking fund requirements on its bonds the proceeds of which were used to construct its extensions and for third tracking the Manhattan elevated lines.

(39) The published reports fail to segregate the operating revenue of the Manhattan lines from the Interborough extensions and the Interborough elevated extensions. So far as is known no report has ever been furnished to Manhattan or its stockholders showing what if any losses have been incurred in the operation of the Manhattan lines, although the lease of Manhattan to Interborough provides for such accounting at the expense of the Interborough. The matter is of transcendent importance inasmuch as the outlying and non-paying portions of the elevated extensions built by Interborough have been used as a single line with Manhattan leased lines. If the Manhattan lines apart from the extensions are responsible for part of this enormous deficit the Interborough receivers must promptly disaffirm the Manhattan lease. 116 117

(40) Your complainant further respectfully alleges and urges that this Court immediately appoint new and independent receivers for Manhattan, so as to provide for the continued operation of the Manhattan lines, and to furnish adequate transportation to the public and protect Manhattan, its stockholders and bondholders from irreparable loss including possible loss if its franchises of operation should be suspended. With the danger of the bondholders setting aside the present receiverships

by foreclosure of the Manhattan first mortgage because of the default in the non-payment of taxes and the threatened default on the interest upon its mortgage due on October 1st, amounting to over $800,000. and the admission by Interborough in its answer that it has no funds to meet this payment and that there are no sources to which it can turn to in the future to pay the same, Manhattan would be unable to borrow funds necessary to operate its lines and to train and pay the personnel necessary to carry on such operations if the receivers disaffirmed the lease. On the other hand, proper receivers
119 for Manhattan would by order of Court be enabled to borrow sufficient funds since receivers' certificates could as a matter of law be established as a prior lien on all of Manhattan's properties. Complainant herein alleges and avers that a Court of Equity may authorize the issuance of receivers' certificates for the operation of railways or other public corporations which shall be a prior lien over all mortgages and indebtedness of the company.

(41) Your complainant further prays for the immediate appointment of independent receivers of Manhattan upon the further ground that if the receivers of Inter-
120 borough operate the Manhattan lines at a loss such loss as a matter of law must be borne by Manhattan and would be chargeable to it. Manhattan should be left to its own destinies. Complainant believes that Manhattan confining their efforts to the affairs of Manhattan and concentrating only on Manhattan's problems should better succeed in their making profits for Manhattan or reducing its losses by operating independently of the Interborough's receivers who have the duty imposed upon them of watching out for Interborough's affairs primarily.

(42) The Court's attention is also called to another serious question in the event of a foreclosure proceeding

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being instituted upon the setting aside of the present Interborough and Manhattan receiverships. As hereinabove pointed out, Interborough's bondholders claim a lien on the third tracks built in 1913 or thereafter on the Second, Third and Ninth Avenue lines of Manhattan and in addition thereto claim a lien for the improvements and enlargements made upon the Manhattan power stations in 1913 or thereafter. The amount asserted to have been expended by Interborough for construction of the third tracks and power house improvements is between $27,000,000. and $40,000,000. Interborough procured the funds for the purpose of making such expenditures from 122
the sale of Interborough bonds on or about the year 1913. The Manhattan first mortgage of which the Central Hanover Bank & Trust Company of New York is Trustee was executed by Manhattan on February 26, 1890, and was duly recorded and made a matter of public record at or about the same time.

(43) In the event of a foreclosure sale of Manhattan's properties the Manhattan bondholders under its earlier recorded mortgage would claim the third tracks and power house improvements free and clear of any claims of Interborough's bondholders; the Interborough bondholders, or the receivers for the Interborough, may 123
establish a prior lien of the third tracks for the benefit of the Interborough bondholders. It will be necessary for independent and properly appointed receivers for Manhattan to protect and uphold the rights of Manhattan in said power houses and said third tracks.

(44) Interborough attributes their losses (complainant believes erroneously) sustained in operation to the Manhattan lines and extensions. Mr. Hedley, President and General Manager of Interborough stated among other things to the Manhattan stockholders in 1922, that if a receiver were appointed for Interborough—

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"2. Such receiver would not be permitted to pay the back 7% dividends nor indeed any rental for the Manhattan lines.

"3. Such receiver would therefore temporarily operate the lines in the public interest and the earnings would doubtless be impounded during such operation. No dividends would be paid during such period.

"4. The property would ultimately be surrendered by the receiver to its owners, the Manhattan
125 stockholders.

"5. The Manhattan Company would have to take its property and operate it to preserve its franchises from forfeiture."

Mr. Hedley's statements apply as well today as they did when he made them. Indeed the mounting losses of Interborough from the operation of the elevated division including the Manhattan lines, make his statements most significant at the present time now that Interborough and Manhattan are in need of receivership. Interborough's receivers are in duty bound to protect its security holders and stockholders from further heavy
126 losses. Interborough can in all probability be saved from further loss by the disaffirmance of the lease. There is, therefore, in view of the premises an imperative, urgent and immediate need of an independent and proper receiver and/or receivers being appointed to protect the interests of Manhattan.

WHEREFORE, complainant files this bill of complaint on behalf of itself and all other stockholders for the benefit of the Corporation, and prays

1. That the designation of Hon. Martin T. Manton, Circuit Judge, dated August 25th, 1932, appointing him-

self as District Judge for the purpose of hearing the application for a receiver of the Interborough Rapid Transit Company be vacated and set aside.

2. That the order of Hon. Martin T. Manton, Circuit Judge, dated August 25th, 1932, appointing himself as an additional District Judge to hear all applications for the appointment of receivers in equity causes in the Southern District of New York, be vacated and set aside.

3. That this Court vacate and set aside the order entered August 26, 1932, appointing Victor J. Dowling 128
and Thomas E. Murray, Jr., as temporary receivers for the Interborough in the American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company, et al. (E. 70-364) upon the ground that said Circuit Judge was without jurisdiction to entertain said petition for receivership or to make the order of appointment of said receivers.

4. That this Court vacate and set aside the order made September 6, 1932, appointing William Roberts, as temporary receiver for Manhattan in the American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company, et al, on the ground that said Circuit 129
Judge was without jurisdiction to entertain the petition of Manhattan Railway Company, or to make said order for the appointment of said receiver.

5. That this Court appoint independent receivers for Interborough who are disassociated with either the Brooklyn-Manhattan Transit Company, or the Interborough Rapid Transit Company, and their respective officers, bankers or counsel.

6. That this Court appoint independent receivers for Manhattan, who are familiar with the operations, track-

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age and financial status and commitments of Manhattan, and versed by experience with problems of re-organization and refinance, to the end that the interests of complainant and all others similarly situated, and the creditors and other security holders of Manhattan, may be properly represented and protected.

7. That the attorneys and counsel appointed for such receiver and/or receivers of the Interborough shall have no connection of whatsoever kind or nature with the Manhattan or Brooklyn-Manhattan Transit Company, or with
131 their officers, bankers, attorneys and counsel.

8. That the counsel appointed for such receiver and/or receivers of the Manhattan shall have no connection of whatsoever kind or nature with the Interborough or Brooklyn-Manhattan Transit Company or with their officers, bankers, attorneys and counsel.

9. That an account shall be taken of all sums due and owing to Manhattan by Interborough.

10. That there shall be fixed and determined the amount to be paid by the receiver or receivers of Interborough to Manhattan for the use, occupation and oper-
132 ation of the properties, trackage facilities, railroad facilities, cars, equipment, power, compensation of employees and all other items properly chargeable to the receiver or receivers of Interborough.

11. That the damages caused by the breach of the lease between Manhattan and Interborough shall be fixed and determined, or in the alternative, that the court shall decree specific performance of the lease between Interborough and Manhattan.

12. That the court shall determine the respective rights, duties, obligations and liabilities of Manhattan and Interborough and shall enter such order, decree and judgment as shall seem equitable and meet in the premises.

13. That this Honorable Court will forthwith appoint separate and independent receivers of all and singular the property and assets of every nature, wheresoever situated, held, owned or controlled by Manhattan and by Interborough, respectively, with full power and authority to take into their respective possessions, hold, manage 134
and operate the business and properties of the defendants, Interborough and Manhattan, respectively, and receive and collect the rents, issues and profits thereof, with such powers as this Honorable Court may from time to time grant, including the power to borrow money on receiver's certificates or otherwise, and for that purpose to incur such expenses as may be necessary or advisable in connection therewith, to purchase and sell, for cash or on credit, such merchandise, supplies, equipment, materials or other property as may be necessary or advisable in connection with the administration of the assets of Manhattan and of Interborough, respectively, and the continuation of their respective business to such extent as may 135
be authorized by this Honorable Court; to bring suit for, collect, receive and take into their respective possessions all the property and assets, real, personal or mixed, goods, chattels, credits, rights, claims and equities, books, papers, securities, cash and other property whatsoever and wheresoever situated; and in continuing, managing and operating said businesses, so far as authorized by this Honorable Court, to act in association with any receiver or receivers who may be appointed by any other

court to take possession of and operate any property of the same defendant situated outside the jurisdiction of this court, and to that end to transfer and consent to the transfer from time to time of such raw materials, materials in process, finished products, moneys and credits to and from this jurisdiction and any such other jurisdiction for the purpose of said business to the extent that the conduct thereof may from time to time reasonably require, and to cooperate to the fullest extent with any such other receiver or receivers in continuing, managing and operating said business, so far as authorized by this
137 Honorable Court, as a whole, and in arranging for and making such transfers; to appoint and employ such managers, agents, employees, servants, accountants, attorneys and counsel as may in his or their judgment be advisable or necessary in the management, conduct, control or custody of the affairs of the defendants and of the assets thereof, and to make such payments and disbursements as may be needful or proper for the purposes aforesaid or otherwise for the preservation and operation of the properties of Manhattan and of Interborough, respectively, so far as authorized by this Honorable Court, including authority to make payment of debts entitled to priority and of the wages and salaries of agents, employ-
138 ees, laborers and servants of said Manhattan and of Interborough, respectively, accrued or to accrue, which are entitled to priority by statute or which said receiver or receivers shall deem to be necessary or expedient to pay to secure the continuation of their services or to avoid detriment to the working organization of the business; to institute, prosecute and defend, compromise, adjust, intervene in or become a party to suits, actions, proceedings at law, in equity, or in admiralty, including ancillary proceedings in state or federal courts or courts of foreign nations, and likewise to defend, compromise or adjust, or

otherwise dispose of any or all suits, actions or proceedings instituted against him or them as receiver or receivers or against Manhattan or Interborough, respectively, and also to appear in and conduct the prosecution or defense of any suit or adjust or compromise actions or proceedings now pending in any court by or against Manhattan, or Interborough, respectively, and to compound and settle with all debtors of said defendants, respectively, with persons having possession of their respective properties or in any way responsible at law or in equity to Manhattan, or Interborough, respectively, and with the further usual powers of receivers in such cases; and that 140 the officers, managers, superintendents, agents, attorneys, and employees of Manhattan and of Interborough, respectively be required forthwith to deliver up to said respective receivers the possession of all and every part of the properties of the defendants Manhattan and Interborough, respectively, wheresoever situated, including the several books, vouchers and papers in any way relating to the business or corporate proceedings of the said defendants, respectively.

14. That this Honorable Court administer all and singular the property rights and business belonging to Manhattan and Interborough, respectively, and adjudi- 141 cate, enforce and adjust the rights, liens, equities and claims of all the creditors of the said defendants, including the claim of complainants, as the same may be determined, and adjust the rights between Manhattan and Interborough.

15. That all creditors, stockholders and other persons be enjoined permanently and pendente lite from instituting or prosecuting or continuing the prosecution of any actions, suits or other proceedings at law or in equity or under any statute against Manhattan and/or Inter-

borough, respectively, and from levying any attachments, executions or other processes upon or against any of the properties of Manhattan and/or Interborough, respectively, and from taking or attempting to take into their possession any part of the property of Manhattan and/or Interborough, respectively, and from doing any act whatsoever to interfere with the possession of and management by the said respective receivers of the properties of Manhattan, and Interborough, respectively, or in any way to interfere with the said receiver or receivers in the discharge of his or their duties, or to interfere in
143 any way with the administration and disposition in this suit of the affairs and properties of Manhattan and Interborough, respectively.

16. That all creditors of Manhattan and of Interborough, respectively, and all persons interested in Manhattan and or Interborough, be permitted to intervene in and become parties to this suit if and as permitted and authorized so to do by this Honorable Court.

17. That this complainant shall have such other and further relief as to the court may seem just and equitable in the premises together with the costs of this action.

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CHARLES FRANKLIN,
Attorney for Complainant,
Office & Post Office Address,
165 Broadway,
Borough of Manhattan,
New York City.

LOUIS BOEHM
Of Counsel

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## Supplemental Bill of Complaint of Benjamin F. Johnson.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

*against*

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

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IN EQUITY
E 71-153-1932

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TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

Your petitioner, Benjamin F. Johnson, by his solicitor, Charles Franklin, praying to this court for the appointment of a receiver or receivers of MANHATTAN RAILWAY COMPANY (hereinafter called "Manhattan") and for the Interborough Rapid Transit Company, supplements his petition dated September 20, 1932, annexed to the order to show cause why such receivers should not be ap-

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pointed, signed by United States District Judge Francis G. Caffey, and returnable on October 4, 1932, at 10:30 o'clock in the forenoon, in Room 235 of the Old Post Office Building, Borough of Manhattan, New York City.

I. In addition to the interest of complainant who has instituted this suit in his derivative right as a stockholder of Manhattan Railway for the benefit and protection of Manhattan and all stockholders similarly situated, including bondholders and all others financially interested in said company, petitions for intervention have been
149 filed on behalf of Manhattan Railway Company stockholders Protective Committee, representing in excess of $10,500,000. of the Manhattan Modified Stock, as well as petitions of intervention by other stockholders and bondholders of the Manhattan and Interborough Companies in excess of $5,000,000. Your petitioner is informed that other shareholders and bondholders of Manhattan and Interborough will join in the prayers for the appointment of receivers.

The defendants above-named have been duly served with copies of the bill of complaint, and the aforesaid order to show cause and the defendant, Manhattan, In-
150 terborough and the Receivers thereof were also served with copies of the order of this court authorizing that they be made parties defendant in this suit.

II. There is urgent necessity for the immediate appointment of receivers of Manhattan and Interborough upon the grounds in the original bill and hereinafter set forth.

III. The interest required to be paid by Interborough upon Manhattan's obligations is four (4%) per cent per annum on Forty Million Six Hundred and Sixty-three

Thousand ($40,663,000) Dollars Consolidated First Mortgage Bonds due in 1990 held by the Central Hanover Bank and Trust Company as Trustee, said interest amounting to approximately $800,000, became due and payable on October 1, 1932; that the same was not paid and there is now, therefore, a default under said mortgages entitling the trustee thereunder, or a committee of bondholders to foreclose the lien of said mortgage, in the State or Federal Court, unless this Court takes judicial custody of the properties of Manhattan Railway Company, and appoints a Receiver therein.

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IV. The said Manhattan first mortgage indenture under which the Central Hanover Bank and Trust Company is trustee provides under Paragraph "Ninth" thereof that "Manhattan shall promptly pay all taxes, assessments or other like charges lawfully laid, charged or imposed upon the mortgaged premises or any part thereof, including the property represented by any stocks, bonds or other like muniments or evidence of ownership deposited with or held by the Trustee as aforesaid, *which may become prior to the lien of* these presents;".

V. Paragraph "Third" of the indenture provides:

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> "That upon any and every such default in the payment of any interest of the bonds hereby secured or of any of them, and its continuance as aforesaid, or upon any and every such default by said Railway Companies or either of them in any other act or thing herein required to be kept, done or performed by them or either of them, the holders of a majority in amount of the bonds hereby secured at the time outstanding may, by writing to be delivered to the Trustee, declare the principal of all the bonds hereby secured to be, and the same

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shall thereupon become, immediately due and payable; and upon any and every such default in the payment of any interest of the bonds hereby secured, or of any of them and its continuance as aforesaid, or upon any and every default in the payment of the principal of any of the bonds hereby secured as herein provided, or upon any and every such default by said Railway Companies or either of them in any other act or thing herein required to be kept, done or performed by them or either of them, then and in every such case the
155 Trustee may, and, upon the request in writing of the holders of a majority in amount of the bonds hereby secured at the time outstanding, and upon being indemnified to its satisfaction against all costs and expenses to be incurred by it in complying with such request, the Trustee shall, with or without entry as aforesaid, proceed to sell and shall sell to the highest bidder therefor at public auction in the City of New York, the right, title, interest and estate of the Manhattan Company of, in and to the mortgaged premises, as an entirety, after first giving notice of the time and place of such sale by advertisement thereof in two or more
156 newspapers published in the City of New York not less than twice a week for the three weeks preceding such sale and, upon such sale, as the attorney in fact of the Manhattan Company, to convey, transfer and assign to the purchaser or purchasers the mortgaged premises so sold, and apply the proceeds of such sale, after first paying thereout all its costs and expenses of such sale, to the payment of all moneys due upon said bonds for principal and interest, etc."

VI. Paragraph "Fourth" provides an alternative remedy for the trustee to institute foreclosure proceedings. This right however is not limited to the trustee but permits the bondholders to institute foreclosure as follows:

> "No holder or holders of a bond or bonds hereby secured or of any interest coupons thereof shall have the right to institute any suit, action or proceeding in equity or at law for the foreclosure of these presents or the execution of the trusts hereof or for the appointment of a receiver of the premises hereby mortgaged or any part thereof, without having first given notice in writing to the Trustee of the fact that the default has occurred and requested the Trustee to proceed with all lawful remedies, and afforded it a reasonable opportunity to proceed to exercise the powers granted to it by these presents and to institute such suit, action or proceeding in its own name as may in its judgment be adapted to that end, but the Trustee may in all such cases, if so advised, require, and need not proceed until it shall have received, indemnity satisfactory to it against all expenses and liabilities to be incurred by it, before complying with such request, and no one or more holders of said bonds or coupons shall have the right, in any manner whatever, to enforce, affect, disturb, impair or prejudice the lien of these presents by his or their action, except through or by means of the concurrent action of the holders of a majority in amount of said bonds at the time outstanding as in these presents provided."

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VII. No period of grace is provided in the indenture to make good a default in the payment of taxes before

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action may be taken by the bondholders or the trustee. A multiplicity of suits is now possible under the terms of the indenture. Such suits could be brought in the State Courts and in the case of the trustee, being a New York Corporation, it would be obliged to institute suit in the State Court inasmuch as Manhattan is also a New York Corporation.

VIII. The following issues are bound to arise and will require judicial determination. If the Manhattan bondholders or trustee under the indenture institute foreclosure proceedings in the State Court, because of the
161 default in the non-payment of Manhattan's taxes, this court having taken no action to appoint receivers for Manhattan, the State Court receivers will forthwith take possession of all of the Manhattan lines, rolling stock, equipment, power stations, etc. will undertake to operate the lines and collect and retain all of the fares paid at the Manhattan stations. They may declare Interborough's lease from Manhattan forfeited by virtue of Interborough's breach of the covenants of the lease and discontinue all service from the Interborough lines to the Manhattan lines and vice versa and cut off the power now being supplied by Manhattan's power stations to
162 certain of the Interborough lines. Such an occurrence would cause great hardship and inconvenience to the public in such an event.

For example: (a) The Manhattan Ninth Avenue line which terminates at 162nd Street and Jerome Avenue now carries passengers over an elevated extension built by the Interborough extending from 162nd Street and Jerome Avenue to the Woodlawn Cemetery at about 242nd Street. These passengers are carried at a single fare. State Court receivers of Manhattan would not have power to transmit the travelling public in a northerly direction beyond 162nd Street. State Court re-

ceivers could refuse to take aboard passengers at 162nd Street and Jerome Avenue who had come to that station from the Jerome Avenue extension without their paying an additional fare to the State Court receivers. (b) Passengers travelling in a northerly direction on the Manhattan Third Avenue line who are now permitted to travel for a 5¢ fare as far as White Plains Road over the Webster Avenue extension of Interborough which connects with the Manhattan Third Avenue line at Third Avenue and Pelham Bay Road, would, under State Court receivership be permitted to travel only as far as Pelham Bay Road and would be compelled to get out at that point, 164 board an Interborough train proceeding north over the Webster Avenue extension and pay an additional fare. At the present moment a passenger pays one single 5¢ fare and remains on the Manhattan train which proceeds today from its own lines directly over the Webster Avenue extension of the Interborough. Likewise passengers boarding the Webster Avenue extension and travelling in a southerly direction and desiring to continue on the Manhattan Third Avenue line into New York City would have to leave the Interborough train at Pelham Bay Road, board a Manhattan train at that point and pay an additional fare. (c) A similar situation would arise at 165 143rd Street and Third Avenue where passengers are now permitted to leave the Manhattan train and board one of the Interborough trains at that point to proceed for one fare over the Westchester Avenue extension also built by the Interborough road. In the event of a cancellation of the Manhattan lease by the State Court receivers, the passengers would be required to pay an additional fare and so upon the passengers return when travelling in a southerly direction. (d) A like situation is possible at 59th Street and Second Avenue. A passenger at the present time boarding a Second Avenue

train to go to Queens can board a Manhattan Second Avenue train and travel over the Queensboro extension to Queens for a single fare. If the Queensboro extension built by the Interborough was cut off by Manhattan's receivers a passenger would be required to pay two fares and vice versa when travelling from Queens to New York City.

If under the law of Public Service Corporations Interborough bondholders or the receivers for Interborough may succeed in establishing in the Federal Court a prior lien on the third tracks for the benefit of Interborough's
167 bondholders, two opposite adjudications of courts of concurrent jurisdiction are again possible.

It has been contended for many years and the claim is now made by persons financially interested in Manhattan that even if Interborough's bondholders have a lien prior to the Manhattan bondholders the amount thereof is many million dollars less than Twenty-seven Million ($27,000,000) Dollars and that the moneys paid for the construction of the third tracks was realized from the sale of Manhattan second mortgage bonds which were issued in or about the year 1913. Both the State and Federal Courts may have the jurisdiction to pass on these questions and it is possible that the decisions of the two
168 courts may reach opposite conclusions.

The foregoing are not idle or moot questions stated for the purpose of alarming the court. They are vital questions affecting the future of both companies and must sooner or later be answered by some court of competent jurisdiction. The amounts involved on each issue will probably run into many millions of dollars. The public interest is seriously involved in most, if not all of the issues raised.

Your petitioner and complainant and the other stockholders and bondholders who have intervened, and in the

interest of orderly procedure so as to avoid a travesty on our courts and in the interest of the public, respectfully renew their prayers for the immediate appointment of receivers of Manhattan and Interborough.

IX. Upon the foregoing grounds and upon the grounds hereinafter stated, your petitioner prays that the receivers to be appointed for Manhattan and Interborough and that the counsel appointed for such receivers shall have no connection of whatsoever kind and nature with Interborough or Brooklyn Manhattan Transit Company or with their officers, directors, stockholders, 170
bondholders or any committee or committees or counsel representing committees acting on behalf of persons or corporations financially interested in any respect with Interborough or Brooklyn Manhattan Transit Company.

The charge has been made and has been freely circulated in the public press, in financial magazines and in statistical publications that Interborough has planned for sometime past to drop its lease with Manhattan and that the purpose of placing itself under the jurisdiction of an equity court was that this result may be accomplished through the appointment of receivers of Interborough who as such would have the power to disaffirm 171
the Manhattan lease. The public as well as persons financially interested in Manhattan are seriously concerned if such a step is to be taken. In order that the receivers of Interborough may not be charged with unfairness or disregarding the interests of the public in the event they deem it necessary or prudent to disaffirm said lease, receivers should immediately be appointed to protect the interests of Manhattan and be prepared to continue the operation of its lines if the lease is disaffirmed. With independent receivers acting for Manhattan and with independent receivers acting for Interborough and

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with this court having jurisdiction over both sets of receivers and all of the properties of both companies, disputed issues may be immediately determined by the court and the respective receivers can carry out the court's mandates without hindrance or delay. With all parties before it and having exclusive jurisdiction as to all matters, this court can best protect the interests of the public and all other parties.

X. Your petitioner on behalf of the complainant and the others above-named prays that this court exercise its
173 chancery powers to protect Manhattan in its present crisis and prevent a forfeiture of its franchise and its lease and its very valuable easement rights. It has been estimated that the removal of the elevated structures on Sixth and Ninth Avenue lines alone would increase assessable property along and adjacent to the line by from One Billion ($1,000,000,000) Dollars to One Billion Five Hundred Million ($1,500,000,000) Dollars which would provide an annual increase in tax revenues to the City from that source of Twenty-five Million ($25,000,000) Dollars. This revenue is the equivalent of five (5%) percent on Five Hundred Million ($500,000,000) Dollars which would probably be a sum sufficient to purchase all
174 of the transit systems in the City of New York. An example of the value to the City of the removal of the elevated roads is the increase in property values from Seventeen Million ($17,000,000) Dollars to Seventy Million ($70,000,000) Dollars from 43rd Street to 59th Street on Sixth Avenue when the elevated spur between those two points was removed. It was the opinion of Samuel Untermyer, Esq., former counsel to the Transit Commission, that the Manhattan stockholders should receive Sixty ($60.00) Dollars per share under the proposed unification plan. Others expressed the opinion that the

shares of Manhattan based on the value of its easement rights alone are worth up to Three hundred ($300.00) Dollars per share. With such valuable easement rights and also the right to Manhattan to procure a 7¢ fare it is respectfully urged that this court appoint receivers of Manhattan immediately to save these valuable rights. A suspension of operation of Manhattan's lines or a foreclosure by the first mortgage bondholders in the State Court may completely destroy the value of the stockholders' equity in Manhattan. The present book value of their shares is approximately One Hundred ($100.00) Dollars per share or Sixty Million ($60,000,000) Dollars. Your petitioner prays that the Court follow the recognized practice in equity and appoint receivers for Manhattan.

XI. Petitioner avers that three of the four members of the Executive Committee of Manhattan dominating and controlling said Committee, are directors of Interborough. Mr. Charles L. Hayden a director of Manhattan is also a director of Interborough and is a director of the Brooklyn Manhattan Transit Company. Manhattan has been under the domination and control of Interborough ever since it took over Manhattan's properties lock, stock and barrel in 1903. Despite the protest of the holders of Manhattan modified stock that sufficient earnings have been made to pay dividends to them during the past few years, no accounting has ever been procured by Manhattan's directors or its Executive Committee from Interborough to ascertain the exact status of operations of the Manhattan lines, although Manhattan's lease specifically provides that it may employ accountants at Interborough's expense to ascertain the earnings from the Manhattan lines. Paragraph "VIII" of the lease provides:

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"For the protection of the Manhattan Company in respect of accounting methods and the determination of earnings and the distribution of earnings between the two divisions, it is to be provided that in case the Board of Directors of the Manhattan Company should be dissatisfied with the accounting methods of the Interborough Company for any period, then, at the instance of the Manhattan Company, independent certified public accountants (chosen by agreement or by some neutral party like the President of the Cham-
179 ber of Commerce), shall be called in, at the expense of the Interborough Company, to examine the accou its for that period. If the accountants should report the amounts that should have been paid by the Interborough Company to the Manhattan Company as rental to be greater than the payments actually made or that payment should thereafter be made upon a higher basis, the Interborough Company shall make payment accordingly."

The members of the Executive Committee of Manhattan in control who are also directors of Interborough
180 have so far as is known taken no steps whatever to protect Manhattan from default under its first mortgage caused by Interborough's failure to pay Manhattan's taxes. Manhattan became a mere shell under the lease arrangements made with Interborough and has continued a mere shell since 1903. It has no personnel to operate a transit system and if its properties were thrust back upon it, it would have neither trained executives to operate them nor as above pointed out, could it procure funds to do so. Complaint has been made from time to time against Interborough for failure to operate steel cars

over the Manhattan lines as it does upon its own lines. The Manhattan stations and properties are dilapidated in appearance compared with stations and properties of the Interborough. There is a specific duty imposed upon Interborough under this lease with Manhattan to keep the properties in good condition and repair "*so that the business of said demised railways shall be preserved, encouraged and developed, the business thereof done with safety and expedition, and the public accommodated as respect thereto, with all practicable conveniences and facilities.*" (From Article IX of the lease dated January 1, 1903) Notwithstanding this provision Manhat- 182
tan's officers, directors and its Executive Committee have failed to compel Interborough to carry out these provisions of the lease. The failure to provide comfortable and modern cars, the failure to provide steel cars for safety, the failure to keep up the appearances of the stations and the property, have all re-acted to the detriment of Manhattan and to the corresponding benefit of Interborough in that passengers seeking safety and more convenient cars have used the subway lines rather than the elevated lines. With the domination and control which Interborough has over all of Manhattan's properties and the failure and neglect on the part of Manhattan's Executive Committee the majority of whose mem- 183
bers serve as directors of Interborough to protect Manhattan's legal rights under the terms of the lease, this court should immediately step in and provide that protection to Manhattan and its vast body of bondholders and stockholders which the Manhattan directors have neglected and failed to do. Interborough has treated Manhattan as a step-child and for years it has sacrificed Manhattan's interest for its own advancement and financial benefit, flagrantly violating its legal obligations to it. Manhattan's directors have permitted these viola-

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tions to carry on and have failed in their duty as fiduciaries to Manhattan either to make recovery for the damages done to Manhattan or to prevent further injustices to Manhattan. A serious crisis has been reached in Manhattan's affairs and its very existence is threatened. If the court fails to appoint receivers for Manhattan now it will be forced to suspend operations upon the disaffirmance of the lease by the Interborough receivers. The harm and injury to the public will be incalculable and those financially interested in Manhattan, particularly the stockholders will probably lose their entire in-
185 vestment.

XII. That since the service and filing of petitioner's bill and the service and filing of the order to show cause granted herein, asking that the orders of Circuit Judge Manton appointing receivers of Interborough and Manhattan be vacated and set aside, and that all parties to the American Brake Shoe and Foundry Company bill be stayed pending the hearing and determination of the motion from applying to have the receiverships made permanent, and for the other relief therein requested, the said Circuit Judge has issued the following additional orders, namely:

186 "This cause came on to be heard at this term and therefore, upon consideration thereof,

It was Ordered, Adjudged and Decreed as follows:

1. The receivership of the defendant Interborough Rapid Transit Company and of all its property and assets, and the extension of such receivership to defendant Manhattan Railway Company and of all its property and assets, are hereby continued during the pendency of this cause; Victor J. Dowling and Thomas E. Murray Jr. are

hereby continued as Receivers of the defendant Interborough Rapid Transit Company and of all its property and assets during the pendency of this cause, with all the powers heretofore granted said Receivers by the order of this Court entered herein; and William Roberts is hereby continued as Receiver of the defendant Manhattan Railway Company and of all its property and assets during the pendency of this cause, with all the powers heretofore granted said Receiver by the order of this Court entered herein September 6, 1932, appointing him Receiver of Manhattan Railway Com- 188
pany and by any other orders heretofore entered herein.

2. All other terms and provisions of said order entered herein August 26, 1932, and of said order of September 6, 1932, and all other orders entered herein are continued during the pendency of this cause, until the further order of this court.

3. The bonds of the said Receivers, Victor J. Dowling and Thomas E. Murray Jr. in the sum of $100,000. each heretofore given by each of said Receivers in accordance with said order of this Court entered herein August 26, 1932, shall stand, 189
and said bonds are hereby approved and shall be and be deemed to be the bonds of such Receivers acting pursuant to this order, and said Receivers are hereby authorized to pay the premiums on said bonds out of the receivership estate of Interborough Rapid Transit Company.

4. The bond of the said Receiver, William Roberts, in the sum of $100,000 heretofore given by said Receiver in accordance with said order of this Court entered herein September 6, 1932, shall stand, and said bond is hereby approved and shall be and be deemed to be the bond of said Receiver

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acting pursuant to this order, and said Receiver is hereby authorized to pay the premium on said bond out of the receivership estate of Manhattan Railway Company.

5. Any application or petition for orders or instructions or otherwise in this cause shall be made to the undersigned in chambers or otherwise, the undersigned hereby reserving full right and jurisdiction over this cause and any and all proceedings herein.

6. The September 1932, equity term of this
191 court is extended until after the complete execution and carrying out of this order and decree, and until after the final determination and disposition of all matters herein reserved for future determination or action by this court. Said equity term is extended, in any event, for a period of three years from the date of this order or decree, with leave to any party to the above-entitled cause at any time prior to the expiration of said period of three years to apply to this court reserving full jurisdiction over the parties to the above-entitled cause and over the property and assets of the defendant, Interborough Rapid Transit Company
192 and of the defendant, Manhattan Elevated Railway Company, and reserves for later adjudication or other action any and all matters which in due course may come before this court for determination and for that purpose the term of the court is hereby extended.

Dated, New York, September 28th, 1932.

MARTIN T. MANTON
United States Circuit Judge designated to hold a session of the District Court, for the Southern District of New York."

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Petitioner is informed and believes and therefore avers that the above quoted order extending the September, 1932, equity term of this Court for a period of at least three years from the date thereof, and continuing the receiverships of the Interborough and Manhattan during the pendency of the American Brake Shoe cause, was and is irregular, improper, null, void, and of no legal effect, upon the jurisdictional grounds in the original bill and herein set forth, and that the said order and all acts taken by said Circuit Judge from the inception of the proceeding should be declared null and void and vacated and set aside.

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XIII. That since the filing of the bill of complaint in this cause, the defendant Interborough Rapid Transit Company has defaulted in the payment of principal and interest due October 1, 1932, upon its $10,500,000. of 6% Notes, in addition to said defendant's default in the payment of principal and interest upon its $31,672,100. of Convertible 7% Notes due September 1, 1932, although petitioner is informed and believes, and therefore avers, that said defendant Interborough took no steps and made no efforts to prevent the receivership, but on the contrary, maintained during the entire period of depression in this country, and up to the time of its consent to the 195
receivership, the high scale of salaries and wages to its officers and employees, and were needlessly wasteful, extravagant and careless in other relations to such an extent as seriously to impair its credit, without any real or determined effort to refinance its maturing obligations hereinabove mentioned which is said to have precipitated the receivership.

Wherefore, your petitioner renews his prayers on behalf of the complainant and all of the stockholders and bondholders above-named as well as on behalf of all

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others intervening in this action that the Court grant the prayers of the bill of complaint as herein supplemented, and make the appointments of receivers prayed for; and that this Court also vacate and set aside all other orders or rulings made by Hon. Martin T. Manton, Senior Circuit Judge, since the filing of complainant's original bill.

BENJAMIN F. JOHNSON,
By (Signed) CHARLES FRANKLIN,
Solicitor.

(Signed) CHARLES FRANKLIN,
197 Attorney,
Office & Post Office Address,
No. 165 Broadway,
Borough of Manhattan,
LOUIS BOEHM, New York City.
Of Counsel.

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## Supplemental Subpoena.

E71-153

THE PRESIDENT OF THE UNITED STATES TO

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers, of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN 200
BRAKE SHOE AND FOUNDRY COMPANY,

GREETING:

YOU ARE HEREBY COMMANDED to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a Supplemental Bill of Complaint exhibited against you in the said Court in Equity, by

BENJAMIN F. JOHNSON

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and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of Two HUNDRED AND FIFTY ($250.) DOLLARS.

WITNESS, HONORABLE JOHN C. KNOX, Judge of the District Court of the United States for the Southern District of New York, on the 3rd day of October in the year One Thousand Nine Hundred and Thirty-two and

*Supplemental Subpoena.*

of the Independence of the United States the One Hundred and fifty-seventh.

CHARLES WEISER
Clerk.

BOEHM & ZEIGER
30 Broad Street
Solicitor.

The defendants are required to file their Answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof, excluding the day of said service, otherwise the Bill aforesaid may be taken Pro Confesso.

CHARLES WEISER
Clerk.

SEAL

## Supplemental Petition of Benjamin F. Johnson.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

*against*

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY
E. 71-153-1932.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK:

The supplemental petition of Benjamin F. Johnson, respectfully shows and represents:

(1) With respect to the appointment of the *de facto* receiver, William Roberts for the Manhattan Railway Company, which is believed to be void, your petitioner

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further avers on information and belief that the said Roberts knew long in advance of the filing of the application for receivership of the Interborough Rapid Transit Company, and the subsequent application for receivership of Manhattan Railway Company, that the same were brought about pursuant to an understanding or conspiracy of which the said Roberts had knowledge, and in support of petitioner's belief, he says:

(a) That at a special meeting of the directors and/or executive committee of Manhattan Railway Company
209 held during the latter part of April, 1932, the said Roberts presented to Manhattan Railway Company a bill for $60,000., or thereabouts, for professional services alleged to have been rendered to said Company for a period of three years prior thereto. That at the time of the special meeting, said Roberts was president, counsel and a director of the Company. That at said special meeting the directors authorized the payment to Roberts of said $60,000., although the payment of said sum to Roberts virtually exhausted the entire cash in the treasury of said Company.

(b) That in April and May, 1932, although it was
210 known to Roberts from the official financial reports of the Interborough Rapid Transit Company that said Company had cash on hand far in excess of its cash the previous year, nevertheless instructions were issued by the firm of J. P. Morgan & Company, the bankers of the Interborough Rapid Transit Company, that there should be no payment made of some $860,000. due to the City of New York for real estate and franchise taxes on Manhattan Railway Company, the said taxes being due in May, 1932. That said Roberts took no action in the matter at that time, and it was not until long after the

special meeting at which he secured for himself payment for all of his legal services to Manhattan Railway Company that the said Roberts, for the first time, wrote letters to the management of the Interborough Rapid Transit Company making claim for under maintenance of the property of Manhattan Railway Company and for failure to make replacements on the property of Manhattan. Railway Company in violation of the existing lease of Manhattan lines to Interborough, and your petitioner believes that such action taken in June and July, 1932, or only one month prior to the receivership of the Interborough Rapid Transit Company, was solely for the purpose of protecting the said Roberts against a suit by the stockholders, and others, for misfeasance and malfeasance in office.

(c) Your petitioner is informed and believes, and therefore avers, that during all of the negotiations extending for several years with the Transit Commission and other public bodies in connection with proposed plans for the unification of New York City's systems of transportation, the said Roberts although president, counsel and director of Manhattan Railway Company took no part in the negotiations for unification and did not designate any attorney or agent to represent Manhattan Railway Company at any of said conferences to the great detriment of the security holders and creditors of Manhattan Railway Company.

(d) Your petitioner further says, that during the entire tenure of office by said Roberts, he has done virtually nothing to promote the interest and welfare of Manhattan Railway Company. That he took no interest in its affairs, that he did not own but a very small amount of the stock of said Company at any time, and that dur-

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ing the entire period, and particularly for several months prior to the filing of the receivership applications for Interborough and Manhattan, the said Roberts was and is under the domination and control of the interests representing Brooklyn-Manhattan Transit Company and Interborough Rapid Transit Company, and that there is great need for having at least two receivers for Manhattan Railway Company who are wholly independent and in whom the stockholders of the Company have faith and confidence, for without such independent receivers it will be virtually impossible to afford protection to the stock-
215 holders of Manhattan Railway Company and others financially interested therein.

(2) Your petitioner further says, that Thomas L. Chadbourne of the firm of Chadbourne, Stanchfield & Levy has been for years and was up to the time of the filing of application for receivership, the special counsel for the Brooklyn-Manhattan Transit Company; that a few days before the filing of the receivership petition by American Brake Shoe & Foundry Company *vs.* Interborough Rapid Transit Company, the said Chadbourne attended before the Transit Commission of the State of New York and represented the Brooklyn-Manhattan
216 Transit Company, and subsidiaries, in negotiations respecting unification and other transit problems. That upon the Interborough Rapid Transit Company being placed in equity receivership through the orders of Senior Circuit Judge Manton herein complained of, the said Chadbourne made the statement to numerous persons and reporters that such receivership would probably make it necessary for his associate and partner, Victor J. Dowling, to sever his connections with said firm of Chadbourne, Stanchfield & Levy.

(3) Petitioner further avers that although the order appointing Victor J. Dowling, as receiver of Interborough Rapid Transit Company, was made on August 26, 1932, the said Dowling was at the time in Europe, and that he did not return to the United States until on or about September 7, 1932. On said day, namely, September 7, 1932, as petitioner is informed and believes, the said Dowling was interviewed by numerous persons, including ship reporters representing various newspapers in the City of New York, and that said Dowling on that day made the statement that he was not sure whether he would have to resign his association and connection with the law firm of Chadbourne, Stanchfield & Levy, who were unlawfully designated to act as the counsel for the receivers of the Interborough Rapid Transit Company.

(4) Petitioner is informed and believes, and therefore avers, that in view of the statement made by said Chadbourne following the receivership, and in view of the statement made by said Victor J. Dowling upon his return to the United States that his appointment some 10 days earlier would require his severance with the law firm of Chadbourne, Stanchfield & Levy, that the affidavit of said Victor J. Dowling, verified on September 23, 1932, to the effect that he had severed all relations or connections with said law firm prior to his appointment as receiver requires further investigation in that the same does not properly comply with Rule 11 of the General Rules of the Court governing equity causes; moreover, that the affidavit filed by Thomas L. Chadbourne, verified on August 26, 1932, intended as a compliance with Rule 11 governing equity causes, does not properly comply with said rule, and your petitioner believes that the affidavit and appointment designating the firm of Chadbourne, Stanchfield & Levy, in view of the connections

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of members of this firm with the Brooklyn-Manhattan Transit Company and the Interborough Rapid Transit Company who have a common chairman of the board and common directors, plainly shows that said law firm should not be allowed to act as the attorneys for receivers, if and when said solicitors are appointed by this Court.

(5) Your petitioner believes that independent receivers and independent counsel for receivers should be appointed for Manhattan Railway Company and for In-
221 terborough Rapid Transit Company who are experienced and well versed in finance, reorganization and who are familiar with the serious and complicated problems affecting Manhattan Railway Company and the Interborough Rapid Transit Company as a result of the default of the 6% and 7% Notes of Interborough, as well as the default under the existing lease of Manhattan Railway Company, inasmuch as the same are believed to be in furtherance of a conspiracy involving the said Chadbourne and the said Dowling, and the said Murray, the co-receiver for Interborough Rapid Transit Company, and the said Roberts,—the acting receivers appointed by orders of Senior Circuit Judge Manton, which petitioner
222 believes should be vacated and set aside on the ground that they were and are void.

(6) There is annexed hereto a printed financial report of the Interborough Rapid Transit Company as of June 30, 1932, published in the Wall Street Journal of September 30, 1932, from which it will be noted that the Interborough Rapid Transit Company had cash on hand in June, 1932 of $4,588,298., as against cash on hand on the same date in 1931 of only $3,882,290., and that the real estate and franchise taxes were paid by the Inter-

borough in 1931 before the aforesaid conspiracy was entered upon. Moreover, the said report shows virtually no difference in the Company's gross income as between 1931 and 1932. Furthermore, the said report shows that the Interborough Rapid Transit Company deducted as a charge the rental of 5% on Manhattan Modified Stock at full accrual of 5% on all of the $55,000,000. of said stock outstanding, although no dividends have been paid on said stock for several years. Moreover, it will be noticed from said financial statement that while the fixed charges of the Interborough System in 1931 was $14,102,224., that in 1932 the fixed charges were only $13,995,576. 224

(7) Petitioner further avers that at a recent hearing before Judge Manton on the question of paying the real estate and franchise taxes, the representatives of the Interborough Rapid Transit Company, through counsel, stated openly to the Court that the Interborough Rapid Transit Company had cash on hand at this time of approximately $8,000,000. Your petitioner believes, and therefore avers, that an analysis and independent audit of the accounts of Interborough Rapid Transit Company would show that said Company was and is in a very prosperous condition, and that there was no need for the defaults on its Gold Notes on September 1st and October 1, 1932, respectively, and that if every railroad in the United States was in as good condition as Interborough Rapid Transit Company there would not have been and there would not be any depression in this country; and that this so-called friendly receivership which appears now to be necessary on account of the defaults should at least be administered by thoroughly independent and thoroughly competent receivers and counsel. 225

*Supplemental Petition of Benjamin F. Johnson.*

WHEREFORE, your petitioner renews his prayers that this Court should take judicial custody of the Interborough and Manhattan properties and administer the same, and appoint independent receivers for the benefit and protection of all of the security holders and creditors of both companies.

BENJAMIN F. JOHNSON,
By (Signed) CHARLES FRANKLIN,
Solicitor.

(Signed) CHARLES FRANKLIN,
Solicitor for Complainant,
Office & Post Office Address,
165 Broadway,
Borough of Manhattan,
New York City.

LEONARD H. GOLDENSON,
Of Counsel.

*Supplemental Petition of Benjamin F. Johnson.*

WALL STREET JOURNAL, SEPTEMBER 30TH, 1932.

## $831,749 I. R. T. Loss Year to June 30

### Figure in Preliminary Report Compares With $533,484 in Previous Period

Preliminary report of Interborough Rapid Transit Co. for year ended June 30, 1932, shows loss of $831,749 after taxes, rentals, fixed charges, etc., but before deducting 5% dividend rental on Manhattan modified guarantee stock, comparing with loss of $533,484 in the preceding fiscal year. After deducting 5% Manhattan modified dividend rental, there was a deficit of $3,614,199, against deficit of $3,315,934 in preceding fiscal year.

Preliminary income account for year ended June 30, 1932, compares as follows:

| | *1932* | *1931* | *1930* | *1929* |
|---|---|---|---|---|
| Gross | $66,320,859 | $70,758,024 | $72,391,867 | $69,174,294 |
| Oper Exp | 42,829,177 | 45,535,580 | 45,401,438 | 42,344,462 |
| Net rev | $23,491,682 | $25,222,444 | $26,990,429 | $26,829,832 |
| Taxes | 2,377,443 | 2,892,228 | 2,522,435 | 2,393,735 |
| 1-X Current rent deductions. | 3,022,536 | 5,027,934 | 5,022,838 | 5,058,835 |
| Other deduct | 354,368 | ..... | ..... | ..... |
| Bal to be div between city and co | $15,737,335 | $17,302,282 | $19,445,156 | $19,377,262 |
| Pay to city under contract No. 3 | 2,685,388 | 3,827,838 | 5,477,627 | 404,776 |
| Company's gross income. | $13,051,947 | $13,474,444 | $13,967,529 | $18,972,486 |
| Fixed charges | 13,955,576 | 14,102,224 | 13,696,197 | 13,743,572 |
| Net op loss | $ 903,629 | $ 627,780 | 2-X$ 271,332 | 2-X$ 5,228,914 |
| Non-op income | 71,880 | 94,296 | 356,040 | 561,436 |
| Loss | $ 831,749 | $ 533,484 | 2-X$ 627,372 | 2-X$ 5,790,350 |
| 3-X Manhat div rent | 2,782,450 | 2,782,450 | 2,782,450 | 2,782,450 |
| Deficit | $ 3,614,199 | $ 3,315,934 | $ 2,155,078 | X$ 3,007,900 |

3-X Dividend rental of 5% on Manhattan modified guarantee stock (payable if earned) is shown above at full accrual of 5% on all stock assenting to plan of readjustment of May 1, 1922.

1-X Includes 7% dividend rental on Manhattan guarantee stock.

2-X Income.

*Supplemental Petition of Benjamin F. Johnson.*

General balance sheet of Interborough Rapid Transit Co. as of June 30, 1932 (preliminary figures), compares as follows:

ASSETS

| | *1932* | *1931* | *1930* |
|---|---|---|---|
| Fixed capital | $231,244,596 | $230,348,028 | $229,623,429 |
| Const & equip funds | 1,222,122 | 1,262,003 | 1,358,443 |
| Investments | 15,938,566 | 15,937,029 | 15,935,546 |
| Vol relief fund | 97,754 | 89,205 | 94,687 |
| Cash | 4,588,298 | 3,882,299 | 7,671,191 |
| Special deposits | 370 | 514 | 180,218 |
| Mortgage bonds payable | 685,000 | 281,000 | 285,000 |
| Accts rec, incl int accrd | 420,192 | 574,976 | 614,125 |
| Due corp gen cash and construction fund | 33,587 | 27,269 | 25,822 |
| Prepayments | 140,432 | 250,749 | 295,131 |
| Due corp cash from sub cash | ..... | ..... | 3,547,916 |
| Due from assoc cos | 6,906,199 | 6,906,426 | 6,906,392 |
| Items await distrib | ..... | ..... | 668,204 |
| Accts in suspense | 5,721,082 | 5,715,422 | 5,118,752 |
| Deferred charges | 19,735,378 | 17,205,685 | 16,133,108 |
| Def und elev ex | 125,931,104 | 114,110,004 | 103,300,434 |
| Materials & suppl | 2,237,988 | 2,595,499 | 2,456,988 |
| Secur dep with State Ind Commission | 1,908,000 | 1,064,000 | 1,064,000 |
| Due from N Y R T | 2,401,022 | 1,952,004 | 1,505,018 |
| Bank Trust Co, trustee under coll ind | 54,989,000 | 56,018,000 | 56,698,000 |
| First & ref mtge 5% bonds reacquired | 1,612,000 | 863,000 | 747,000 |
| Guaranty Trust Co. trust under spec agree dated Sept 1, 1922 | 6,740,000 | 7,232,000 | 2,263,000 |
| Adv from corp fund for const und contr No. 3 | 11,535,954 | 11,469,858 | 11,376,808 |
| Total | $494,068,644 | $477,764,970 | $467,869,212 |

LIABILITIES

| | | | |
|---|---|---|---|
| Capital stock | $ 35,000,000 | $ 35,000,000 | $ 35,000,000 |
| Funded debt | 171,906,000 | 170,853,000 | 169,694,000 |
| Notes outstanding | 42,172,100 | 42,738,000 | 43,124,000 |
| Rap Tr Sub Constr Co notes payable | 5,898,448 | 4,860,108 | 3,490,108 |
| Manhattan Ry Co lease acct | 377,323 | 377,323 | 377,323 |
| Accts pay from const & eq funds | 244,482 | 222,065 | 218,124 |
| Sink fd on 1st & ref mtg 5% bonds accrued | 1,320,582 | 1,401,090 | 1,438,805 |
| Lessee's deduct under Contr No. 3 due corp cash from sub cash | ..... | ..... | 3,547,916 |
| Due for wages | 493,335 | 594,592 | 529,779 |
| Int & rent due & accrd | 3,860,573 | 4,295,066 | 8,053,139 |
| Accounts payable | 1,000,244 | 832,529 | 763,248 |
| Taxes due and accrd | 1,652,325 | 1,018,844 | 1,695,689 |
| 1st & ref bds released as coll to 7% notes for skg fd due July 1, 1930 | ..... | 281,000 | 285,000 |
| Trustee for vol relief fund | 97,754 | 89,205 | 94,688 |
| Items await distrib | 561,664 | 255,741 | 270,130 |
| Deferred liabilities | 19,407,584 | 17,076,735 | 16,167,527 |
| Deprec reserves, etc | 2,155,397 | 1,275,097 | 1,289,291 |
| Def cred accr und elev ex cert | 125,931,104 | 114,110,004 | 103,300,433 |
| Res for cost of items which und agree-m't of Aug 30, 1929, have become assets of the enterprise | 4,145,988 | 3,659,499 | 3,520,987 |
| Def rent acct N Y R T Corp | 2,401,022 | 1,952,004 | 1,505,018 |
| 1st & ref mtge 5% gold bds pledged as coll | 54,989,000 | 56,018,000 | 56,698,000 |
| Rel by Bank Trust Co trustee | 1,612,000 | 863,000 | 747,000 |
| Issued & held in special trust | 6,740,000 | 7,232,000 | 2,263,000 |
| Def cred—adv from corp fund for const & eq und Contr No. 3 | 11,535,954 | 11,469,858 | 11,376,808 |
| Surplus | 565,765 | 1,310,210 | 2,419,199 |
| Total | $494,068,644 | $477,784,970 | $467,869,212 |

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## Bill of Complaint of Lillian Boehm.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

*against*

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM
239 ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY
E 71-153-1932

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TO THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

The intervenor, LILLIAN BOEHM, brings this, her supplemental bill of complaint, against the above named defendants, and respectfully alleges the following:

1. On information and belief, that the complainant herein, BENJAMIN F. JOHNSON, is a resident of Winchester, Kentucky, and a citizen of the State of Kentucky, and is the record holder of 100 shares of the defendant,

Manhattan Railway Company (hereinafter called Manhattan), having a par value of $10,000.

2. That the intervenor, LILLIAN BOEHM, was by order of the Hon. Francis G. Caffey, United States District Judge, Southern District of New York, dated September 21, 1932, and duly filed in the Office of the Clerk of this Court, permitted to intervene as a party plaintiff in the above entitled action.

3. That the intervenor is a resident of the County and City of New York, and a citizen of the State of New 242
York, and is the owner of $60,000. of First and Refunding Mortgage 5% gold bonds of the defendant, Interborough Rapid Transit Company due in 1966, and $35,000. of its Ten Year Secured Convertible 7% gold notes which became due on September 1st, 1932, and are now in default.

4. On information and belief, that the defendants Manhattan Railway Company and Interborough Rapid Transit Company (hereinafter called Interborough), are railroad corporations, and were at all times hereinafter mentioned, and are now, corporations duly organized and existing under and by virtue of the laws of the State of New York, and are citizens of said State, having their 243
principal offices in the City of New York, in the Southern District of New York. That the defendants Victor J. Dowling and Thomas E. Murray, Jr., are citizens and residents of the State of New York, and were appointed temporary receivers of the defendant Interborough by an order of Honorable Martin T. Manton, U. S. Circuit Judge, on August 26, 1932, on a bill (E. 70-364) filed in the office of the Clerk of this Court; that the defendant, William Roberts, is a citizen and resident of the State of New York, and was appointed temporary receiver of the defendant Manhattan by order of Honorable Martin

T. Manton, U. S. Circuit Judge, on September 6, 1932, said appointment having been made on petition of intervention in said suit (E. 70-364). That the defendant American Brake Shoe and Foundry Company is a foreign corporation created and existing under the laws of the State of Delaware, and is made a party defendant on account of its interest in the subject-matter of this suit.

5. That this is a suit of a civil nature in equity; that the matter in controversy exceeds the sum or value of $5,000., exclusive of interest and costs, and is between citizens of different states.

6. On information and belief, that the defendant, Interborough, is a railroad corporation duly formed on or about May 6, 1902, under and in pursuance of Chapter 565 of the laws of 1890 of the State of New York, known as the Railroad Law, and the acts amendatory thereof and supplemental thereto, and pursuant to the provisions of Chapter 544 of the laws of 1902 of the State of New York, being an Act entitled "An Act to Amend Chapter 4 of the Laws of 1891, entitled 'An Act to Provide for Rapid Transit Railways in Cities of Over One million Inhabitants,'" for the purpose, among others, of equipping and operating rapid transit railroads in the City of New York.

7. On information and belief, that on or about February 21, 1900, the City of New York, acting by the Board of Rapid Transit Railroad Commissioners, entered into a contract with John B. McDonald (known as Contract No. 1) for the construction, at the expense of the City, and for the equipment, maintenance and operation of certain rapid transit lines, subway and elevated, in the Boroughs of Manhattan and the Bronx, in said city, known

as the "Manhattan-Bronx Rapid Transit Railroad," which said contract, including the provisions thereof relating to the equipment, maintenance and operation of said railroad, was subsequently duly assigned to defendant Interborough in the manner required by law.

On information and belief, that on or about July 21, 1902, the City of New York, acting by the Board of Rapid Transit Railroad Commissioners, under the Rapid Transit Act, entered into a contract with Rapid Transit Subway Construction Company (known as Contract No. 2) for the construction, at the expense of the City, and for the equipment, maintenance and operation of certain rapid transit subway lines in the Boroughs of Manhattan and Brooklyn in said city, known as the "Brooklyn-Manhattan Rapid Transit Railroad," which said contract, including the provisions thereof relating to the equipment, maintenance and operation of said railroad, was subsequently duly assigned to the defendant Interborough in the manner required by law.

On information and belief, that on or about March 19, 1913, the City of New York, acting by the Public Service Commission for the First District, under the Rapid Transit Act, entered into a contract with defendant (known as Contract No. 3) for the construction by the City, in part at the expense of said City, and in part at the expense of the defendant Interborough, of certain rapid transit lines in the Boroughs of Manhattan, Bronx, Queens and Brooklyn, and for the equipment, maintenance and operation of the rapid transit lines to be constructed under said contract in conjunction with said Manhattan-Bronx Rapid Transit Railroad and said Brooklyn-Manhattan Rapid Transit Railroad then operated by the defendant Interborough under said Contract No. 1 and under said Contract No. 2.

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On information and belief, that the defendant Interborough is now engaged in the maintenance and operation of all of said rapid transit railroads, including the new lines constructed under said Contract No. 3, so far as the same have been completed by the City of New York.

On information and belief, the said system of rapid transit railroads now maintained and operated by the defendant Interborough under said contracts, consists of more than seventy-six (76) miles of continuous railroad, and more than two hundred sixty-two (262) miles of
251 single track in all boroughs of the City of New York except the Borough of Richmond, and the defendant Interborough employs more than eighteen thousand men.

8. On information and belief, that on or about January 1, 1903, by indenture of lease bearing said date, the defendant Manhattan Railway Company, a railroad corporation organized and existing under the laws of the State of New York, owning a system of elevated railroad in the Borough of Manhattan and the Bronx, of the City of New York, leased the said system of elevated railroad to the defendant Interborough for the term of nine hun-
252 dred and ninety-nine (999) years from November 1, 1875, upon the terms and conditions, and for the rentals in said indenture of lease set forth.

On information and belief, that on or about March 19, 1913, the Public Service Commission for the First District issued to the defendant Manhattan, and defendant Manhattan accepted, a certain certificate for the construction, equipment, maintenance and operation of certain additional tracks to certain elevated lines of said Manhattan, and that said additional tracks have been con-

structed and equipped and are now operated by the defendant Interborough under said lease.

On information and belief that on or about March 19, 1913, the Public Service Commission for the First District issued to the defendant Interborough, and the said defendant accepted, a certain certificate for the construction, equipment, maintenance and operation of certain extensions to the elevated lines, or some of them, operated by the said defendant under said lease; and that said elevated extensions have been constructed and equipped and are now operated by the said defendant under the terms of said certificate in conjunction with, and as part of the elevated system leased by the said defendant from defendant Manhattan.

On information and belief, that said elevated railroad system, including said additional tracks and elevated extensions now operated by the defendant Interborough, consists of more than forty-one (41) miles of railroad and more than one hundred thirty-seven (137) miles of single track in the Boroughs of Manhattan and the Bronx, in the City of New York.

9. On information and belief, that the cost to the defendant Interborough of the Elevated third tracks, Elevated Extensions and Manhattan power plant improvements constructed and furnished in accordance with the provisions of the aforesaid Manhattan and Interborough Certificates each granted March 19, 1913, is in excess of $44,000,000, all of which cost was provided from the proceeds of the sales of bonds and notes issued by defendant Interborough.

10. On information and belief, that in and by the documents and agreements which taken together are

known and described as the "Interborough-Manhattan Re-adjustment Plan of 1922," among other things, it was provided that as to all holders of capital stock of Manhattan who might assent to and participate in such Plan the 7% annual rate of guaranteed dividend rental on such capital stock as fixed in the aforesaid lease from the Manhattan to defendant, Interborough, should be reduced, after July 1, 1924, to the rate of 5% per annum and should be payable only if and to the extent earned by defendant Interborough in the manner in said Plan provided; that the holders of more than 90% of the outstand-
257 ing capital stock of Manhattan assented to said Plan and agreed to accept said reduced rent; that the reduced dividend rental on said capital stock of Manhattan as and when earned at the rates provided in the said Readjustment Plan has been paid by defendant Interborough, that the defendant Manhattan has formally expressed its dissatisfaction with accounts of defendant Interborough for the period subsequent to June 30, 1928, and has claimed that the dividend rental on its stock for such period is greater than the payments which defendant Interborough has made.

11. On information and belief, that under said Con-
258 tract Nos. 1, 2 and 3, it is, among other things, provided that in case the defendant Interborough shall be in unexcused default in the payment of the rental, or in the performance of any other of the obligations of said contracts, and any such default shall continue for the period or periods therein stated, the said contracts may be terminated on the terms and conditions therein set forth.

On information and belief, that under the said lease from Manhattan and the said Interborough-Manhattan Readjustment Plan it is, among other things, provided that in case the defendant Interborough shall fail to pay

the rent provided for in said lease, as reduced in accordance with the provisions of said Plan, and such default shall continue for the period therein stated, the leasehold estate thereby created may be terminated.

12. On information and belief, that the defendant, Interborough, has an authorized capital stock issued and outstanding of Thirty-five million dollars ($35,000,000); that all of the equipment provided by the defendant Interborough under said Contracts Nos. 1 and 2, including the power houses, sub-stations and rolling stock provided under said contracts and all the right, title and interest of the said defendant in said contract number 3, said lease from the Manhattan and the said certificate for elevated extensions issued to the defendant Interborough and certain other property and assets of the said defendant have been heretofore pledged under and are now subject to the First and Refunding Mortgage of the defendant Interborough, dated March 20, 1913, to Guaranty Trust Company of New York as Trustee, under which there are now issued and outstanding in the hands of the public bonds to the principal amount of more than One hundred and thirty-two million ($132,000,000) dollars, and under which there are now outstanding bonds to the additional amount of more than Fifty-four million dollars ($54,000,000), pledged to secure an issue of Ten Year Secured Convertible 7% Gold Notes of the defendant, due September 1, 1932, of which there are outstanding, in the hands of the public, notes to the principal amount of Thirty-one million, six hundred and seventy-two thousand one hundred dollars ($31,672,100); that there are also issued and outstanding in the hands of the public defendant Interborough's Unsecured Ten Year Six per cent. Gold Notes, due October 1, 1932, in the principal amount of Ten Million five hundred thousand dollars

($10,500,000); that interest on said First and Refunding Mortgage 5% gold Bonds of the defendant is due and payable on the first days of January and July in each year; that interest on said Ten Year Secured Convertible 7% Gold Notes is due and payable on the first days of March and September in each year; and that interest on said Unsecured Ten Year Six per cent. Gold Notes is due and payable on the first days of April and October in each year.

13. On information and belief, the lease from said
263 Manhattan Railway Company provides that the defendant Interborough shall pay as rental for the elevated lines demised by said lease, in addition to all taxes on the lessor and its property, the following:

> Seven per cent. (7%) per annum on the authorized and outstanding capital stock of said Manhattan Railway Company to the aggregate par value of Sixty million dollars ($60,000,000), payable quarterly to the owners of record of the shares of said stock, on the first days of January, April, July and October in each year, but as to 556,490 shares of said capital stock the dividend rental rate has been reduced to 5% per annum, payable
> 264 if earned, as hereinabove.
>
> Four percent. (4%) per annum on the Consolidated Mortgage 4% bonds of said Manhattan Railway Company of which Forty million six hundred and eighty-three thousand dollars ($40,683,000), are now outstanding, payable semi-annually on the first days of April and October in each year.
>
> Four percent. (4%) per annum on the Second Mortgage Bonds of said Manhattan Railway Com-

pany of which Four million five hundred and twenty-three thousand dollars ($4,523,000) are now outstanding, payable on the first days of June and December in each year.

14. That the defendant Interborough has failed to pay, at maturity, its Ten-Year Secured Convertible 7% Gold Notes due September 1, 1932, and this intervenor alleges that some of the over five thousand noteholders may bring suits in respect of their said notes and may levy execution on the equipment and property of the defendant Interborough used in the operation of said rapid transit subway and elevated lines; that failure to meet the interest on said First and Refunding Mortgage 5% Gold Bonds when due may operate as a default under the mortgage securing the same and render such mortgage enforceable; and that failure to pay the interest when due on said bonds of Manhattan may operate as a default under said lease and upon the expiration of the period of grace therein provided will render the same terminable; and that failure to pay each installment of rental under said lease, when due, payable to the holders of 43,510 shares of the stock of said Manhattan, who did not assent to the Readjustment Plan of 1922, may also operate as a default under said lease and will subject the defendant Interborough to innumerable actions by the holders of said stock to collect the same by reason of the guarantee by the defendant Interborough of the payment of such rental when due to each of the holders of such stock.

15. On information and belief, that defendant Interborough has failed and neglected to pay certain taxes for 1928 and 1929 duly assessed by the City of New York against various parcels of real estate owned by defendant Interborough and subject to the lien of its First and Re-

funding Mortgage, and that such unpaid taxes with the interest now due thereon amount in the aggregate to more than $480,000; that defendant Interborough's failure to pay such real estate taxes as and when the same became due, or within a period of ninety (90) days thereafter, constitutes an act of default (which has continued down to date), under the provisions of defendant Interborough's First and Refunding Mortgage and makes it subject to an action to foreclose the lien of said Mortgage.

On information and belief, that defendant Interbor-
269 ough has neglected and failed to pay certain taxes for 1932 duly assessed by the City of New York against the special franchises and real estate belonging to Manhattan, the amount of such unpaid taxes with interest now due thereon being in excess of $860,000; that defendant's lessor, Manhattan, has formally demanded in writing that such taxes be paid but that defendant Interborough has neglected and failed and continues to neglect and fail to comply with such demand and make such payment; on information and belief that such failure and such refusal constitutes an act of default on the part of the defendant Interborough under the aforesaid lease from the Manhattan and if continued for a period of ninety (90) days
270 from the date of demand of the Manhattan, will constitute an additional act of default under the terms of the defendant Interborough's First and Refunding Mortgage.

16. On information and belief, that the Transit Commission, being the Metropolitan Division of Public Service of the State of New York, purporting to act in its regulatory capacity, or as agent of the City of New York under Contract No. 3, or both, by order dated April 30, 1930, directed the defendant Interborough to provide 289

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new steel cars ready for subway operation not later than October 1, 1931, together with the necessary power equipment; that thereafter on September 4, 1930, the aforesaid Transit Commission commenced an action or proceeding against defendant Interborough, under the Rapid Transit Act and Section 57 of the Public Service Law, for the enforcement of said order in the Supreme Court, State of New York, which action or proceeding is still pending and is now set down for trial on October 3, 1932; that the cost to defendant Interborough of compliance with the aforesaid order of the Transit Commission would be approximately $8,000,000.

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On information and belief, that the Transit Commission, being the Metropolitan Division of Public Service of the State of New York, purporting to act in its regulatory capacity or as agent of the City of New York under Contract No. 3, or both, by order dated April 21, 1926, directed the defendant Interborough to lengthen certain of its subway local station platforms and furnish in connection therewith 382 new steel subway cars for operation together with the necessary power equipment; that for the purpose of carrying out said order the said Transit Commission acting as aforesaid, by a supplemental order dated December 31, 1927, directed the defendant Interborough to lengthen certain local subway station platforms among others at Canal Street and Spring Street and on September 4, 1930, commenced an action or proceeding against said defendant, under the Rapid Transit Act and under Section 57 of the Public Service Law, in the Supreme Court, State of New York, for the enforcement of said supplemental order of December 31, 1927, which action or proceeding is still pending and is now set down for trial on October 3, 1932; that said order of December 31, 1927, is supplemental to the order of April

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21, 1926, and is one step in carrying out the same; that the cost to said defendant in carrying out said order of April 21, 1926, would be approximately $20,000,000.

On information and belief, that the Transit Commission, being the Metropolitan Division of the Public Service Commission of the State of New York, by order dated June 29, 1927, directed the defendant Interborough to install a certain signal system upon its subway and elevated lines, which said order was duly accepted; that this installation was to be consummated year by year; and
275 that following the terms of said order the cost of the remaining signal installation year by year would be approximately as follows: for fiscal year ended June 30, 1933, $720,000; 1934, $980,000; 1935, $1,750,000; 1936, $3,510,000; 1937, $3,000,000.

On information and belief, that defendant Interborough presently is without funds to enable it to comply with the aforesaid orders or directions, if enforced, and has no means of obtaining such funds.

On information and belief, that the aforesaid Transit Commission, acting as agent for the City of New York, has questioned the propriety and legality of certain
276 charges which the defendant Interborough has made against subway revenues and included within operating expenses for the two years ended June 30, 1931, and that the total of the items so questioned is in excess of $811,000; that the said Transit Commission has indicated its intention of filing with the said defendant formal objections to the items so questioned and that it may file such objections at any time; that under the provisions of Contract No. 3, if, as and when any such objections are filed with the defendant Interborough the latter is obliged to forthwith transfer the amount of such items

to a special suspense account and if it is subsequently determined, in the manner provided in the Contract, that the objections are well founded, then the said defendant is obliged to return to subway revenues any and all amounts so found to have been erroneously, improperly, or illegally charged against such revenue.

17. That the defendant Interborough is indebted to the intervenor in the principal sum of $35,000. upon the $35,000. of its Ten Year Secured Convertible 7% Gold Notes, of which she is the owner, and which became due and payable September 1st, 1932, together with six 27
months' interest thereon, which became due and payable likewise on September 1st, 1932, and that both principal and interest are in default and are now wholly due and unpaid, and that the defendant Interborough has admitted that it is, and will be, without financial resources to meet the same.

On information and belief, that the defendant Interborough has outstanding floating indebtedness for materials, equipment, taxes and supplies to the amount of over Two Million five hundred thousand ($2,500,000.00) Dollars; that said floating indebtedness is now overdue; that the defendant Interborough claims to be unable to pay the same; and that the holders thereof are pressing 27
for payment thereof; that some of said creditors may bring suits in respect of their said claims and may levy execution on the equipment and property of the defendant Interborough used in the operation of said rapid transit subway and elevated lines and on the material and supplies and other property of defendant Interborough on hand and kept by the said defendant for necessary use in operating said railway systems, and intervenor alleges that there is grave danger that the defendant Interborough may thereby be deprived of the use of

equipment, rolling stock and other property essential to the effective and economical operation of the said railroad systems, and that there is likewise grave danger that suits may be instituted against the defendant in respect of the claims above stated, and that it is essential to the interest of all the creditors of the defendant Interborough and to the interest of the public and of the intervenor that the property of the defendant Interborough should not be sacrificed; that the position of the defendant Interborough, and therefore of all the creditors of the defendant, including the intervenor, is rendered more
281 insecure by reason of the present bad financial situation of public service corporations generally and the general financial depression.

On information and belief, that defendant is and will be without financial resources to meet in full the following contractual obligations which are required of it because of the terms of its Mortgage, the Indenture securing its Notes, and the Manhattan lease:

(a) the principal of said Ten Year Secured Convertible 7% Gold Notes, due and payable September 1, 1932, amounting to $31,672,100;

(b) the principal of said Unsecured Ten Year
282 Six per cent. Gold Notes, due and payable October 1, 1932, amounting to $10,500,000.

18. On information and belief, that the only means whereby the defendant Interborough can meet its obligations under said contracts, certificates and leases, and pay its floating indebtedness and discharge its current obligations is by the continued maintenance and operation of said railroads by an uninterrupted use thereof; and that any suits upon or process against its properties or its revenues would seriously embarrass and cripple the

said defendant and diminish, if not destroy, its power successfully to operate said railroad systems; that said railroad subway systems, together with all their appurtenances, rolling-stock and other property connected therewith, are now in a reasonably good state and condition; that during the last year the elevated and rapid transit subway lines operated by the said defendant carried over 1,000,000,000 passengers, and that it is of vital importance to the people of the City of New York that said elevated and rapid transit subway lines shall continue to be operated and to such end it is of like importance that said systems be preserved; that unless some definite 284
action is taken on behalf of all the creditors so that the operations of said railroads may be continued, great and severe loss and irreparable injury will be inflicted upon all creditors; that the credit of the defendant Interborough has been seriously impaired; and that it has no reasonable hope of finding assistance from any quarter.

On information and belief said defendant has assets which at a fair valuation exceed the amount of its liabilities; the said defendant is unable to pay or provide for the payment of its obligations now due and will be unable to meet its obligations in the ordinary course of its business as they become due. 285

Intervenor further alleges on information and belief that unless the Court, in view of the facts above set forth shall take said railroad systems of the defendant Interborough into judicial custody for the protection of every interest therein, that immediately upon default, individual creditors of the defendant Interborough will assert their rights and remedies in different courts; that attempts will be made to secure judgments and priorities, that levies will be made upon cars, rolling stock, material and supplies indispensable to the operation of

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said railroad systems which will greatly interfere with and ultimately prevent defendant Interborough from the proper performance of its duties as a common carrier and will seriously diminish its earnings.

On information and belief, that an attempt by intervenor to enforce at law her claims as a general creditor would precipitate similar action on the part of other creditors; and this in turn would lead to wasteful strife and controversy, which intervenor believes can be avoided and the property preserved for equitable distribution
287 among those entitled thereto, only by the intervention of a Court of Equity and the granting of equitable relief, including the appointment of a receiver, which will lead to a realization for all of the creditors of a substantially larger amount than if such relief were not granted.

19. That, under the circumstances, the interference of a Court of Equity for the protection of intervenor's rights is imperatively required and especially for the time being the appointment of a receiver to take charge of and preserve the property of the defendant Interborough, continue the operation of its railroad systems for the accommodation of the public, and collect and receive
288 and properly appropriate the income thereof until the final decree of the Court in the premises.

20. That the defendant, American Brake Shoe and Foundry Company, claiming as a creditor of the defendant Interborough upon an indebtedness of $27,530.89, owing to it by the said defendant for brake shoes and miscellaneous castings allegedly furnished to the said defendant, commenced an action in equity in this Court entitled "American Brake Shoe and Foundry Company against Interborough Rapid Transit Company" (E-70-

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364), praying, among other things, for an equity receivership for the defendant Interborough, and that upon its bill of complaint therein, and the admission of all the allegations thereof by the defendant Interborough in its answer thereto, and its consent to and joinder in the prayer of the bill of complaint for such receivership, an order was made by the Hon. Martin T. Manton, United States Circuit Judge, on August 26, 1932, appointing the defendants Victor J. Dowling and Thomas E. Murray, Jr., Temporary Receivers of the defendant Interborough.

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21. Intervenor believes and therefore avers that there is imperative need for setting aside the appointments of said receivers, Dowling and Murray, and for the appointment of independent receivers under properly constituted authority for the Interborough Rapid Transit Company, upon the grounds more particularly set forth herein at length.

22. That the appointment of said receivers, as aforesaid, is believed to have been irregular, without warrant or legal authority, and void, as in violation of the effective rules, practice and procedure in the United States 291
District Court for the Southern District of New York. It is believed that the Honorable Martin T. Manton, U. S. Circuit Judge, assumed, without any legal right or any necessity therefor, the rights, powers and privileges of the United States District Court, to appoint receivers in equity causes for the Interborough; that the governing rules of this Court duly promulgated and duly published which were violated and contravened in the appointment of said receivers as aforesaid, read as follows:

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*"United States District Court—Southern District of New York.*

Matter of the Revision of the General Rules of this court by adding thereto Rule 1-a and Rule 11-a.

Due deliberation having been had, it is ordered that, effective July 1, 1932, the following rule, to be designated as 1-a, shall be and become a General Rule of this court, to wit: '1-a. Any judge designated to sit in the District Court for the Southern District of New York, shall do such work only as
293 may be assigned to him by the senior district judge.'

And also effective as of July 1, 1932, the following rule, to be designated as 11-a, shall be and become a General Rule of this court, to wit: '11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy Rules), shall be made to the judge assigned to hold the Bankruptcy and Motion Part of the business of the court and to no other judge.'

294 Dated June 30, 1932.

JOHN C. KNOX
HARRY W. GODDARD
WILLIAM BONDY
FRANK J. COLEMAN
JOHN M. WOOLSEY
FRANCIS G. CAFFEY
ALFRED C. COXE
ROBERT P. PATTERSON
United States District Judges."

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23. Intervenor is informed and believes, and therefore avers, that at the time of the application for the appointment of receivers for the Interborough, namely, on August 26, 1932, there was a United States District Judge duly assigned and sitting in the Motion Part of the Court, as well as other District Judges of the United States District Court who were ready, able and willing to entertain the application for equity receivership of said Interborough.

24. Intervenor is informed and believes, and therefore avers, that at the time of the said application for 296
the appointment of receivers of Interborough, there was no disagreement between the District Judges of the said United States District Court, but said Judges were in entire agreement upon the division of business, and for the assignment of cases for trial, and have ever so continued; that the above quoted rule was duly adopted, approved, signed and published by each of the eight United States District Judges in the said Court.

25. That the above quoted rule was not revoked or abrogated at the time of the appointment of said receivers but was then and now is in full force and effect,
and that the District Judge assigned to the Motion Part 297
did not refuse to act upon the application of Interborough for receivers.

26. Intervenor is informed and believes, and therefore avers, that Circuit Judge Manton in making the said appointments and in taking action on the bill of complaint, unlawfully usurped the duties and functions of the Judges of this Court without legal warrant or any justification.

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27. Upon information and belief, that either the complainant in the Interborough suit, or one of the defendants, or intervenors therein, disregarding the effective rule, practice and procedure in such cases made and provided, and without cause or warrant therefor, prepared or caused to be entered, two separate orders dated August 25, 1932, as follows, both of which orders are believed to be irregular, unlawful and improper, and without necessity or any justification therefor, namely:

"Whereas, the undersigned as Senior Circuit
299 Judge of the Second Judicial Circuit of the United States, is empowered and authorized by law, pursuant to the provisions of Title 28, Sec. 22 of the Code of Laws of the United States of America, if the public interest so requires, to designate and assign any Circuit Judge of the Second Judicial Circuit to hold a District Court within such Circuit; and

Whereas, the undersigned, as such Senior Circuit Judge, finds that the public interest requires that Martin T. Manton, a Circuit Judge of the Second Circuit, be designated and assigned as a Circuit Judge of this Judicial Circuit to hold a
300 District Court within such Circuit, it is hereby

Ordered, adjudged and decreed, that the said Martin T. Manton be and he hereby is designated and assigned to hold a District Court of the United States for the Southern District of New York, Second Judicial Circuit, during the period beginning August 25, 1932, and particularly to hear and determine all applications and proceedings in the matter entitled, American Brake Shoe and Foundry Company *vs.* Interborough Rapid Transit

Company, and for such further time as may be required to complete unfinished business.

Dated, New York, August 25, 1932.

MARTIN T. MANTON
Senior Circuit Judge for the
Second Judicial Circuit."

28. Intervenor is informed and believes, and therefore avers, that there was complete unity of thought and action on the part of the District Judges of this Court in relation to the Court Rule hereinabove quoted. That so far as intervenor knows, there is no prohibition in effective Rules against the appointment of individuals as receivers in equity causes in proper cases, especially where special application is made therefor.

That no such application was made to the District Judge holding the motion part, and that there was no occasion or necessity for designating an additional or other District Judge to hear and act upon the application for the appointment of receivers of the Interborough, in addition to the District Judge sitting in the Motion Part at the time said application was made. That there was no question of public interest involved which called for the designation of an additional District Judge to sit in the equity suit entitled, American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company; in fact, intervenor believes, and therefore avers, that the public interest plainly required full and complete compliance with the effective Rules, Practice and Procedure of this Court on account of the vast and important financial obligations involved.

The other order entered by said Circuit Judge on the same day (August 25, 1932), and filed in the office of the Clerk of this Court, reads as follows:

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"In the United States Circuit Court of Appeals

Second Judicial Circuit.

| | |
|---|---|
| In the Matter of the<br>Division of Business and Assignment of Cases for Trial in the Southern District of New York. | Order |

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Whereas, Martin T. Manton has been duly designated and assigned to hold a District Court of the United States for the Southern District of New York within this Second Judicial Circuit for a period of thirty days from this day; and

Whereas, Section 23 of the Judicial Code (March 3, 1919, c. 231, sec. 23, 36 Stat. 1090) provides that 'In districts having more than one district judge, the judges may agree upon a division of business and assignment of cases for trial in said district; but in case they do not so agree, the
306 Senior Circuit Judge of the Circuit in which the district lies shall make all necessary orders for the division of business and the assignment of cases for trial in said District'; and

Whereas, Martin T. Manton, a Circuit Judge of the Second Judicial Circuit of the United States designated and assigned to hold a District Court in the Southern District of New York in said Circuit, and acting as District Judge for the Southern District of New York in this Second Judicial Circuit, does not agree upon the division of business

and assignment of cases for trial in the Southern District of New York, as provided in and pursuant to the rules of court for the Southern District of New York, heretofore adopted by the then United States District Judges for the Southern District of New York; it is hereby

ORDERED, ADJUDGED AND DECREED that, for a period of thirty days beginning with this day, all applications for the appointment of receivers in equity causes in the Southern District of New York may be made not only to the district judge designated to hear such application pursuant to Rule 11 a of the General Rules of the District Court for the Southern District of New York, but also to Martin T. Manton, Circuit Judge designated to act as District Judge to hold a District Court for the Southern District of New York.

Dated, New York, August 25, 1932.

MARTIN T. MANTON."

29. Your intervenor is informed and believes, and therefore avers, that the above designation and order are each irregular, improper, without legal warrant or justification, and void; moreover, that the action taken by Honorable Martin T. Manton in appointing the aforesaid receivers for Interborough were and are likewise irregular, improper and void, and that all orders made and the action taken by said Circuit Judge subsequent to the filing of the equity bill of the Interborough are likewise null and void, as in violation of the rules, practice and procedure of this Court, and because said Circuit Judge lacked jurisdiction to entertain said receivership applications, and to make any orders, or to appoint said receivers, or to take any action whatever upon said

bill, and therefore there is grave danger that in the near future, if not now, all of the proceedings taken by the Circuit Judge, and all of the action taken by the temporary receivers appointed as aforesaid will be set aside and declared to be null and void and of no effect, to the great detriment of intervenor and of the creditors and security holders of the Interborough, with resulting irreparable damage to said parties, including intervenor.

30. That the interests involved and which are and will be affected by the irregular, void and unlawful and improper action taken on the American Brake Shoe and Foundry Company bill (E. 70-364), are so vast, and the certain likelihood of irreparable loss and damage is so great that this Court is importuned to direct a hearing in this cause at the earliest opportunity to insure against unnecessary loss and damage until the errors, irregularities and the jurisdictional defects hereinabove cited are properly cured.

31. Your intervenor is informed and believes, and therefore avers, that there is special and imperative need for having receivers for the Interborough who are independent and disconnected with the old management of said company in order to insure adequate protection to their interests and that the appointment of the receivers aforementioned, as well as continuance in office of the President and General Manager of the Interborough, or otherwise, does not and will not insure independence of action or protection, of the Interborough creditors and security holders.

32. Your intervenor further avers, upon information and belief, that the designated attorneys for the receivers of Interborough, were the firm with whom Victor J.

Dowling was associated at the time of his appointment as receiver; that said law firm, or certain members thereof, were and for years have been closely associated with the Brooklyn-Manhattan Transit Company, and during the period of one year prior to the date of August 26, 1932, said firm has directly or indirectly had professional and other connection with the subject-matter of this suit, and with the defendant Interborough, the Brooklyn-Manhattan Transit Company, and other persons interested in the cause or interested in the receivership estate. The Brooklyn-Manhattan Transit Company owns a large number of shares of Interborough, and its chairman of the board is also chairman of the board of the Interborough, while the companies also have common directors on the Brooklyn-Manhattan Transit Company, and Interborough. That the Brooklyn-Manhattan Transit Company has never been favorable to Interborough.

33. Intervenor further avers upon information and belief, that the order appointing receivers for the Interborough is void and of no effect whatsoever; that the acts of said receivers acting in a *de facto* capacity are likewise illegal, void and of no effect; that the acts of such *de facto* receivers heretofore done and about to be done have created and will continue to create serious disputes involving the legality of their acts, thereby creating doubt and confusion as to the effect of all the action taken by them.

34. That after the service and filing of the complainant's bill herein, and the service and filing of the order to show cause obtained by the complainant and granted herein, dated September 21st, 1932, praying that the orders of Circuit Judge Manton appointing receivers of the Interborough and Manhattan be vacated and set aside,

and that all parties to the American Brake Shoe and Foundry Company bill be stayed pending the hearing and determination of the said motion from applying to have the receiverships made permanent, and for the other relief in said order to show cause requested, and after the filing of the intervenor's petition for intervention herein, and the entry of the order thereon, permitting her intervention in this action as a party plaintiff, the said Circuit Judge issued the following additional orders dated September 29, 1932:

"This cause came on to be heard at this term and therefore, upon consideration thereof,

It was Ordered, Adjudged and Decreed as follows:

1. The receivership of the defendant Interborough Rapid Transit Company and of all its property and assets, and the extension of such receivership to defendant Manhattan Railway Company and of all its property and assets, are hereby continued during the pendency of this cause; Victor J. Dowling and Thomas E. Murray Jr. are hereby continued as receivers of the defendant Interborough Rapid Transit Company and of all its property and assets during the pendency of this cause, with all the powers heretofore granted said Receivers by the order of this Court entered herein; and William Roberts is hereby continued as Receiver of the defendant Manhattan Railway Company and of all its property and assets during the pendency of this cause, with all the powers heretofore granted said Receiver by the order of this Court entered herein September 6, 1932, appointing him Receiver of Manhattan Railway Company and by any other orders heretofore entered herein.

2. All other terms and provisions of said order entered herein August 26, 1932, and of said order of September 6, 1932, and all other orders entered

herein are continued during the pendency of this cause, until the further order of this court.

3. The bonds of the said Receivers, Victor J. Dowling and Thomas E. Murray Jr. in the sum of $100,000. each heretofore given by each of said Receivers in accordance with said order of this Court entered herein August 26, 1932, shall stand, and said bonds are hereby approved and shall be and be deemed to be the bonds of such Receivers acting pursuant to this order, and said Receivers are hereby authorized to pay the premiums on said bonds out of the receivership estate of Interborough Rapid Transit Company.

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4. The bond of the said Receiver, William Roberts, in the sum of $100,000 heretofore given by said Receiver in accordance with said order of this Court entered herein September 6, 1932, shall stand, and said bond is hereby approved and shall be and be deemed to be the bond of said Receiver acting pursuant to this order, and said Receiver is hereby authorized to pay the premium on said bond out of the receivership estate of Manhattan Railway Company.

5. Any application or petition for orders or instructions or otherwise in this cause shall be made to the undersigned, in chambers or otherwise, the undersigned hereby reserving full right and jurisdiction over this cause and any and all proceedings herein. 321

6. The September 1932, equity term of this court is extended until after the complete execution and carrying out of this order and decree, and until after the final determination and disposition of all matters herein reserved for future determination or action by this court. Said equity term is extended, in any event, for a period of three years from the date of this order or decree, with leave to any party to the above-entitled cause at any time prior to the expiration of said period of

322 *Bill of Complaint of Lillian Boehm.*

three years to apply to this court reserving full jurisdiction over the parties to the above-entitled cause and over the property and assets of the defendant, Interborough Rapid Transit Company and of the defendant, Manhattan Elevated Railway Company, and reserves for later adjudication or other action any and all matters which in due course may come before this court for determination and for that purpose the term of the court is hereby extended.

Dated, New York, September 28th, 1932.

MARTIN T. MANTON
323 United States Circuit Judge designated to hold a session of the District Court, for the Southern District of New York"

The intervenor is informed and believes, and therefore avers that the above quoted order is irregular, improper, null, void and of no legal effect, and that the same should be vacated and set aside.

35. That intervenor has no adequate remedy at law for her aforesaid grievances, and can have relief only in equity.

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WHEREFORE, the intervenor joins in the prayers of the complainant herein set forth in his bill of complaint and supplemental bill and/or petition herein, and the intervenor more specifically prays:

1. That the designation of Hon. Martin T. Manton, Circuit Judge, dated August 25th, 1932, appointing himself as District Judge for the purpose of hearing the application for a receiver of the Interborough Rapid Transit Company be vacated and set aside.

2. That the order of Hon. Martin T. Manton, Circuit Judge, dated August 25th, 1932, appointing himself as an additional District Judge to hear all applications for the appointment of receivers in equity causes in the Southern District of New York, be vacated and set aside.

3. That this Court vacate and set aside the order entered August 26, 1932, appointing Victor J. Dowling and Thomas E. Murray, Jr., as temporary receivers for the Interborough in the American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company, et al (E. 70-364) upon the ground that said Circuit Judge was without jurisdiction to entertain said petition for receivership or to make the order of appointment of said receivers.

4. That this Court vacate and set aside the order made September 28th, 1932, by the Hon. Martin T. Manton, U. S. Circuit Judge, continuing, pendente lite, the Interborough receivership and the appointment of the receivers thereof, and reserving to the said Judge full right and jurisdiction over the said cause, and all proceedings thereof, and extending the equity term of this Court by the Hon. Martin T. Manton, U. S. Circuit Judge, until after the final determination and disposition of all matters in the said equity cause, and, in any event, for three years.

5. That this Court appoint independent receivers for Interborough who are disassociated with either the Brooklyn-Manhattan Transit Company, or the Interborough Rapid Transit Company, and their respective officers, bankers or counsel.

6. That the attorneys and counsel appointed for such receiver and/or receivers of the Interborough shall have no connection of whatsoever kind or nature with the Man-

hattan or Brooklyn-Manhattan Transit Company, or with their officers, bankers, attorneys and counsel.

7. That this Honorable Court will forthwith appoint separate and independent receivers of all and singular the property and assets of every nature, wheresoever situated, held, owned or controlled by Interborough, with full power and authority to take into their possession, hold, manage and operate the business and properties of the defendant, Interborough, and receive and collect the rents, issues and profits thereof, with such powers as this
329 Honorable Court may from time to time grant, including the power to borrow money on receiver's certificates or otherwise, and for that purpose to incur such expenses as may be necessary or advisable in connection therewith, to purchase and sell, for cash or on credit, such merchandise, supplies, equipment, materials or other property as may be necessary or advisable in connection with the administration of the assets of Interborough, and the continuation of its business to such extent as may be authorized by this Honorable Court; to bring suit for, collect, receive and take into their possession all the property and assets, real, personal or mixed, goods, chattels, credits, rights, claims and equities, books, papers, securi-
330 ties, cash and other property whatsoever and wheresoever situated; and in continuing, managing and operating said business, so far as authorized by this Honorable Court, to act in association with any receiver or receivers who may be appointed by any other court to take possession of and operate any property of the said defendant situated outside the jurisdiction of this court, and to that end to transfer and consent to the transfer from time to time of such raw materials, materials in process, finished products, moneys and credits to and from this jurisdic-

tion and any such other jurisdiction for the purpose of said business to the extent that the conduct thereof may from time to time reasonably require, and to cooperate to the fullest extent with any such other receiver or receivers in continuing, managing and operating said business, so far as authorized by this Honorable Court, as a whole, and in arranging for and making such transfers; to appoint and employ such managers, agents, employees, servants, accountants, attorneys and counsel as may in his or their judgment be advisable or necessary in the management, conduct, control or custody of the affairs of the defendant Interborough and of the assets thereof, and to make such payments and disbursements as may be needful or proper for the purposes aforesaid or otherwise for the preservation and operation of the properties of Interborough, so far as authorized by this Honorable Court, including authority to make payment of debts entitled to priority and of the wages and salaries of agents, employees, laborers and servants of said Interborough, accrued or to accrue, which are entitled to priority by statute or which said receiver or receivers shall deem to be necessary or expedient to pay to secure the continuation of their services or to avoid detriment to the working organization of the business; to institute, prosecute and defend, compromise, adjust, intervene in or become a party to suits, actions, proceedings at law, in equity, or in admiralty, including ancillary proceedings in state or federal courts or courts of foreign nations, and likewise to defend, compromise or adjust, or otherwise dispose of any or all suits, actions or proceedings instituted against him or them as receiver or receivers or against Interborough, and also to appear in and conduct the prosecution or defense of any suit or adjust or compromise actions or proceedings now pending in any

court by or against Interborough, and to compound and settle with all debtors of said defendant, with persons having possession of their respective properties or in any way responsible at law or in equity to Interborough, and with the further usual powers of receivers in such cases; and that the officers, managers, superintendents, agents, attorneys, and employees of Interborough, be required forthwith to deliver up to said receivers the possession of all and every part of the properties of the defendant Interborough, wheresoever situated, including the several books, vouchers, and papers in any way relating to the
335 business or corporate proceedings of the said defendant.

8. That this Honorable Court administer all and singular the property rights and business belonging to Interborough, and adjudicate, enforce and adjust the rights, liens, equities and claims of all the creditors of the said defendant, including the claim of the intervenor, as the same may be determined.

9. That all creditors, stockholders and other persons be enjoined permanently and pendente lite from instituting or prosecuting or continuing the prosecution of any actions, suits or other proceedings at law or in
336 equity or under any statute against Interborough, and from levying any attachments, executions or other processes upon or against any of the properties of Interborough, and from taking or attempting to take into their possession any part of the property of Interborough, and from doing any act whatsoever to interfere with the possession of and management by the said receivers of the properties of Interborough, or in any way to interfere with the said receiver or receivers in the discharge of his or their duties, or to interfere in any way with the

administration and disposition in this suit of the affairs and properties of Interborough.

10. That this intervenor shall have such other and further relief as to the court may seem just and equitable in the premises, together with the costs of this action.

LILLIAN BOEHM

BOEHM & ZEIGER
Attorney for Intervenor

LILLIAN BOEHM
Office & P. O. Address,
No. 30 Broad Street,
Borough of Manhattan,
New York City.

LOUIS BOEHM
Of counsel.

340 **Order to Show Cause of September 21st, 1932 on Petition of Benjamin F. Johnson.**

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

*against*

341 MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY
E71-153-1932.

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Upon reading and filing the Bill of Complaint herein and the annexed petition of said complainant, both verified September 20, 1932, and upon the Bill of Complaint in the equity cause entitled American Brake Shoe & Foundry Company *v.* Interborough Rapid Transit Company (E 70-364), and the Bill of Complaint in the equity cause entitled Harry Barber *v.* Manhattan Railway Company, et al (E 71-38), and upon all of the proceedings heretofore had thereon, it is

*Order to Show Cause of September 21st, 1932 on Petition of Benjamin F. Johnson.* 343

ORDERED, that the above named defendants, or their attorneys, show cause before this Court at Room 235, Old Post Office Building, Park Row, Borough of Manhattan, New York City, on the 4th day of October, 1932, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why orders should not be issued:

(1) Vacating and setting aside the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 25, 1932, designating and assigning himself to hold a District 344
Court of the United States for the Southern District of New York to hear and determine all applications and proceedings in the matter entitled American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company.

(2) Vacating and setting aside order of Hon. Martin T. Manton, Circuit Judge, dated August 25, 1932, designating himself for a period of thirty days thereafter to hear and determine all applications for the appointment of receivers in equity causes in the United States District Court for the Southern District of New York.

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(3) Vacating and setting aside the order of Hon. Martin T. Manton, U. S. Circuit Judge, entered August 26, 1932 appointing Victor J. Dowling and Thomas E. Murray, Jr., as temporary receivers for Interborough Rapid Transit Company in the American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company, et al case (E 70-364).

(4) Vacating and setting aside the order of Hon. Martin T. Manton, U. S. Circuit Judge, made September

346 *Order to Show Cause of September 21st, 1932 on Petition of Benjamin F. Johnson.*

6, 1932 appointing William Roberts, as temporary receiver for Manhattan Railway Company in the American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company, et al case (E 70 364).

(5) Appointing independent receivers of the Interborough Rapid Transit Company.

(6) Appointing independent receivers of Manhattan Railway Company.

347 (7) Vacating and setting aside the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 26, 1932 appointing Messrs. Chadbourne, Stanchfield & Levy, as Solicitors and General Counsel for the receivers of the Interborough Rapid Transit Company, as in violation of effective Rules, Practice and Procedure of this Court governing the qualifications of solicitors acting for receivers.

(8) That the American Brake Shoe and Foundry Company, Victor J. Dowling, Thomas E. Murray, Jr. and William Roberts, their agents, attorneys, counsel, employees and servants and/or any, all or each of them be stayed from applying for a permanent receivership
348 of Interborough Rapid Transit Company and Manhattan Railway Company pending the hearing or determination of this motion.

(9) Allowing complainant to have the within petition heard before the United States District Court sitting *en banc.*

(10) That complainant have such other and further relief in the premises as to the Court may seem just and proper.

*Order to Show Cause of September 21st, 1932 on Petition of Benjamin F. Johnson.*

Sufficient reason appearing therefor, service of a copy of this order and the annexed petition upon each and all the defendants above-named, or their attorneys, and upon Harry Barber, or his attorney, on or before the 26th day of September, 1932, shall be deemed sufficient service thereof.

Dated, New York, September 21, 1932.

FRANCIS G. CAFFEY
U. S. D. J.

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## Petition of Benjamin F. Johnson.

UNITED STATES DISTRICT COURT

For the Southern District of New York.

| | |
|---|---|
| Benjamin F. Johnson, Complainant, *against* Manhattan Railway Company, subject to leave of Court William 353 Roberts, as Temporary Receiver of Manhattan Railway Company, Interborough Rapid Transit Company, subject to leave of Court Victor J. Dowling and Thomas E. Murray, Jr., as Temporary Receivers of Interborough Rapid Transit Company, The City of New York, and American Brake Shoe and Foundry Company, Defendants. | In Equity E 71-153-1932 |

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To the Honorable Judges of the District Court of the United States in and for the Southern District of New York:

The petition of Benjamin F. Johnson, respectfully shows and represents that he is the complainant in the above entitled cause.

(1) That the above cause is a stockholders' suit brought on behalf of the Manhattan Railway Company stockholders, and all others similarly situated. For the

contents of the bill of complaint, and the proceedings had thereon, reference is made to the said bill, and the papers on file in the office of the Clerk of this Court.

(2) That petitioner is a citizen of and resident of Winchester, Kentucky, and is the record holder of 100 shares of the capital stock of the defendant Manhattan Railway Company (hereinafter called Manhattan) having a par value $10,000.

(3) That your petitioner did not acquire such shares for the purpose of bringing a collusive suit or for the purpose of conferring jurisdiction of this cause upon this Court, and that this suit is not a collusive one and is brought in good faith for the benefit of the Manhattan Railway Company.

(4) Your petitioner avers that the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 25, 1932, designating and assigning himself to hold a District Court of the United States for the Southern District of New York to hear and determine all applications and proceedings in the matter entitled American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company, and the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 25, 1932, designating himself for a period of thirty days thereafter to hear and determine all applications for the appointment of receivers in equity causes in the United States District Court for the Southern District of New York were each void, irregular, improper and without legal warrant or justification; your petitioner prays that said orders of Hon. Martin T. Manton, U. S. Circuit Judge, be vacated and set aside upon the grounds and allegations set forth in the bill of complaint in this cause.

358 *Petition of Benjamin F. Johnson.*

(5) Your petitioner prays that the orders appointing temporary receivers for Interborough Rapid Transit Company, dated August 26, 1932, and Manhattan Railway Company made September 6, 1932, be vacated and set aside upon the grounds and allegations set forth in the bill of complaint.

(6) That your petitioner avers that receivers should be appointed forthwith for the Manhattan Railway Company and the Interborough Rapid Transit Company upon the grounds and allegations set forth in the bill of com-
359 plaint herein.

(7) That your petitioner avers that the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 26, 1932 appointing Messrs. Chadbourne, Stanchfield & Levy, as Solicitors and General Counsel for the receivers of the Interborough Rapid Transit Company, was and is in violation of the effective Rules and Practice and Procedure of this Court governing the qualifications of solicitors acting for receivers; that your petitioner and complainant avers upon information and belief that said designated attorneys for the receivers of Interborough, were during the period of one year prior to the date of
360 August 26, 1932, directly and/or indirectly connected with the Interborough Rapid Transit Company, and Brooklyn-Manhattan Transit Company, their officers, bankers and other persons interested in the cause or interested in the receivership estate, as is more fully set forth in the bill of complaint herein.

(8) That your petitioner and complainant believes and therefore avers that the importance and significance of this order to show cause makes it advisable that it be heard by this Court sitting *en banc*.

(9) That your petitioner and complainant avers upon information and belief, that the order appointing receivers for the Interborough Rapid Transit Company dated August 26, 1932, and the order made September 6, 1932 appointing receiver for Manhattan Railway Company, are null, void and of no effect; that the acts of said receivers acting in a *de facto* capacity are likewise illegal, void and of no effect; that the acts of such *de facto* receivers heretofore done and about to be done have created and will continue to create serious disputes involving the legality of their acts; that the danger of serious and irreparable injury to the interests of Manhattan and Interborough require that the American Brake Shoe and Foundry Company, Victor J. Dowling, Thomas E. Murray, Jr., and William Roberts, their agents, employees, servants, counsel or attorneys and/or any, all or each of them be enjoined and stayed from applying for a permanent receivership of Interborough Rapid Transit Company and Manhattan Railway Company pending the hearing and determination of this motion.

WHEREFORE, your petitioner and complainant respectfully asks that the prayers for relief contained in the bill of complaint herein, and in this order to show cause, be granted by this Honorable Court, and that receivers of Manhattan Railway Company and Interborough Rapid Transit Company be appointed as prayed for.

364 *Petition of Benjamin F. Johnson.*

That no previous or other application has been made for this relief herein sought.

Dated, New York, September 20, 1932.

BENJAMIN F. JOHNSON
By (Signed) CHARLES FRANKLIN
Solicitor.

(Signed) CHARLES FRANKLIN

CHARLES FRANKLIN,
Solicitor for Complainant,
365 Office & Post Office Address,
165 Broadway,
Borough of Manhattan,
New York City.

LEONARD M. GOLDENSON,
Of Counsel.

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## Order to Show Cause of October 1st, 1932 on Petition and Supplemental Bill of Complaint of Benjamin F. Johnson.

UNITED STATES DISTRICT COURT

For the Southern District of New York.

Benjamin F. Johnson,
Complainant,

*against*

Manhattan Railway Company, subject to leave of Court William Roberts, as Temporary Receiver of Manhattan Railway Company, Interborough Rapid Transit Company, subject to leave of Court Victor J. Dowling and Thomas E. Murray, Jr., as Temporary Receivers of Interborough Rapid Transit Company, The City of New York, and American Brake Shoe and Foundry Company,
Defendants.

Upon reading and filing the supplemental bill of complaint herein, and the annexed petition of the said complainant, both verified October 1st, 1932, and upon the bill of complaint herein, and all papers and proceedings had herein, and upon the bill of complaint in the equity cause entitled "American Brake Shoe and Foundry Company, against Interborough Rapid Transit Company

370 *Order to Show Cause of October 1st, 1932 on Petition and Supplemental Bill of Complaint of Benjamin F. Johnson.*

(E70-364), and upon all of the proceedings heretofore had thereon, it is

ORDERED, that the above named defendants, or their attorneys show cause before this Court, at Room 235, Old Post Office Building, Park Row, Borough of Manhattan, City of New York, on the 4th day of October, 1932, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, WHY orders should not be issued, (1) vacating and setting aside the
371 order of the Honorable Martin T. Manton, United States Circuit Judge, dated September 28, 1932, which, among other things, continued, during the pendency of the said equity cause entitled "American Brake Shoe and Foundry Company against Interborough Rapid Transit Company", the receivership of the defendant, Interborough Rapid Transit Company, and the appointment of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers thereof, and the receivership of the Manhattan Railway Company, and the appointment of William Roberts, as Receiver thereof, and which reserved to the said Hon. Martin T. Manton, United States Circuit Judge, full right and jurisdiction over the said cause, and all
372 proceedings therein, and which extended the equity term of this Court by the Honorable Martin T. Manton, United States Circuit Judge, sitting as United States District Judge, until after the final determination and disposition of all matters in the said equity cause, and, in any event, for a period of three years from the date of the said order or decree;

(2) allowing complainant to have the within petition heard before the United States District Court, sitting *en banc*;

*Order to Show Cause of October 1st, 1932 on Petition and Supplemental Bill of Complaint of Benjamin F. Johnson.*

(3) granting to complainant such other and further relief in the premises as to the Court may seem just and proper.

SUFFICIENT reason appearing therefor, service of a copy of this order, and the annexed petition, on each and all the defendants above named, or their attorneys, on or before 3 o'clock P. M. the 1st day of October, 1932, shall be deemed sufficient service thereof.

Dated, New York, October 1st, 1932.

(sgd) WILLIAM BONDY
U. S. D. J.

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## Petition of Benjamin F. Johnson.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

*against*

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MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY
E. 153-1932.

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TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK:

The Petition of BENJAMIN F. JOHNSON, respectfully shows and represents that he is the complainant in the above entitled cause.

1. That the above cause is a stockholder's suit brought on behalf of the Manhattan Railway Company stockholders, and all others similarly situated. For the contents of the bill of complaint and the supplemental bill of complaint, and the proceedings had thereon, reference is made to the said bill and supplemental bill, and the papers on file in the Office of the Clerk of this Court.

2. That upon the bill of complaint filed herein, and the petition of the complainant, both verified September 20th, 1932, an order to show cause herein was signed by the Hon. Francis G. Caffey, United States District Judge, 380 dated September 21st, 1932, returnable on October 4th, 1932, why orders should not be issued vacating the order of the Honorable Martin T. Manton, United States Circuit Judge, dated August 25th, 1932, designating and assigning himself to hold a District Court of the United States, for the Southern District of New York, to hear and determine all applications and proceedings in the cause entitled "American Brake Shoe and Foundry Company against Interborough Rapid Transit Company", vacating also his order of the same date designating himself for thirty days thereafter to hear and determine all applications for the appointment of receivers in equity causes in this Court, and also his orders dated August 381 26th, 1932, and September 6th, 1932, appointing temporary receivers and receivers' counsel for the Interborough Rapid Transit Company, and a temporary receiver for Manhattan Railway Company, respectively, and why the American Brake Shoe and Foundry Company and the said temporary receivers should not be stayed from applying for permanent receivership pending the hearing and determination of the said order to show cause, and why independent receivers of the said Companies should not be appointed, and allowing the

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petition to be heard before the United States District Court, sitting *en banc*.

3. That since the service and filing of your petitioner's said bill and the order to show cause granted herein, the said Circuit Judge issued an additional order dated September 28th, 1932, continuing, during the pendency of the said equity cause entitled "American Brake Shoe and Foundry Company against Interborough Rapid Transit Company", the receivership of the defendant, Interborough Rapid Transit Company, and the appoint-
383 ment of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers thereof, and the receivership of the Manhattan Railway Company, and the appointment of William Roberts, as Receiver thereof, and reserving to the said Hon. Martin T. Manton, United States Circuit Judge, full right and jurisdiction over the said cause, and all proceedings therein, and extending the equity term of this Court by the Honorable Martin T. Manton, United States Circuit Judge, sitting as United States District Judge, until after the final determination and disposition of all matters in the said equity cause, and, in any event, for a period of three years from the date of the said order or decree.

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4. Your petitioner avers that the said order of Hon. Martin T. Manton, United States Circuit Judge, dated September 28, 1932, was void, irregular, improper, and without legal justification, and your petitioner prays that the said order be vacated and set aside upon the grounds and allegations set forth in the bill of complaint and supplemental bill of complaint in this cause.

5. That your petitioner and complainant believes, and therefore avers, that the importance and significance

of this order to show cause makes it advisable that it should be heard by this Court, sitting *en banc*.

Wherefore, your petitioner and complainant respectfully asks the prayers for relief contained in the supplemental bill of complaint herein and in this order to show cause be granted by this Honorable Court.

That no previous application has been made for the relief herein sought.

Dated, New York, October 1st, 1932.

Benjamin F. Johnson
By (Signed) Charles Franklin
Solicitor.

(Signed) Charles Franklin

Charles Franklin,
Solicitor for Complainant,
Office & P. O. Address,
165 Broadway,
Borough of Manhattan,
New York City.

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## Order to Show Cause of October 3rd, 1932 on Petition of Lillian Boehm.

UNITED STATES DISTRICT COURT

For the Southern District of New York.

Benjamin F. Johnson,
Complainant,

*against*

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Manhattan Railway Company, subject to leave of Court William Roberts, as Temporary Receiver of Manhattan Railway Company, Interborough Rapid Transit Company, subject to leave of Court Victor J. Dowling and Thomas E. Murray, Jr., as Temporary Receivers of Interborough Rapid Transit Company, The City of New York, and American Brake Shoe and Foundry Company,

390 Defendants.

In Equity
E. 71-153-1932.

Upon reading and filing the supplemental bill of complaint of the intervenor, Lillian Boehm, and the annexed petition of said intervenor, both verified October 3rd, 1932, and upon the bill of complaint of the complainant Benjamin F. Johnson herein, and the petition of Lillian Boehm for intervention, and the order dated September 21st, 1932, permitting her to intervene as a party plaintiff in this action, and upon all papers and proceedings had herein, and upon the bill of complaint in the equity cause entitled "American Brake Shoe and Foundry Company

*Order to Show Cause of October 3rd, 1932 on Petition of Lillian Rochm.*

*v.* Interborough Rapid Transit Company (E. 70 364), and upon all other proceedings heretofore had thereon, it is

ORDERED, that the above named defendants, or their attorneys, show cause before this Court at Room 235, Old Post Office Building, Park Row, Borough of Manhattan, New York City, on the 4th day of October, 1932, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why orders should not be issued:

(1) Vacating and setting aside the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 25, 1932, designating and assigning himself to hold a District Court of the United States for the Southern District of New York to hear and determine all applications and proceedings in the matter entitled American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company.

(2) Vacating and setting aside order of Hon. Martin T. Manton, Circuit Judge, dated August 25, 1932, designating himself for a period of thirty days thereafter to hear and determine all applications for the appointment of receivers in equity causes in the United States District Court for the Southern District of New York.

(3) Vacating and setting aside the order of Hon. Martin T. Manton, U. S. Circuit Judge, entered August 26, 1932 appointing Victor J. Dowling and Thomas E. Murray, Jr., as temporary receivers for Interborough Rapid Transit Company in the American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company, et al. case (E. 70 364).

(4) Vacating and setting aside the order of Hon. Martin T. Manton, United States Circuit Judge, entered September 28, 1932, continuing, pendente lite, the Interborough receivership and the appointment of the re-

394 *Order to Show Cause of October 3rd, 1932 on Petition of Lillian Boehm.*

ceivers thereof, and reserving to the said Judge full right and jurisdiction over the said cause, and all proceedings thereof, and extending the equity term of this Court by the Hon. Martin T. Manton, U. S. Circuit Judge, until after the final determination and disposition of all matters in the said equity cause, and, in any event, for three years.

(5) Appointing independent receivers of the Interborough Rapid Transit Company.

395 (6) Vacating and setting aside the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 26, 1932 appointing Messrs. Chadbourne, Stanchfield & Levy, as Solicitors and General Counsel for the receivers of the Interborough Rapid Transit Company, as in violation of effective Rules, Practice and Procedure of this Court governing the qualifications of solicitors acting for receivers.

(7) Allowing intervenor to have the within petition heard before the United States District Court sitting *en banc.*

(8) That intervenor have such other and further re-
396 lief in the premises as to the Court may seem just and proper.

Sufficient reason appearing therefor, service of a copy of this order and the annexed petition upon each and all the defendants above-named, or their attorneys, on or before the 3rd day of October, 1932, shall be deemed sufficient service thereof.

Dated, New York, October 3rd, 1932.

WOOLSEY
U. S. D. J.

## Petition of Lillian Boehm.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

*against*

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY
E. 71-153-1932.

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of LILLIAN BOEHM, respectfully shows and represents that she is an intervenor in the above entitled cause.

1. That the above cause is a stockholder's suit brought on behalf of the Manhattan Railway Company stockholders, and all others similarly situated. For the contents of the bill and supplemental bill of complaint, and the proceedings had thereon, reference is made to

400 *Petition of Lillian Boehm.*

the bill and supplemental bill, and to the papers on file in the Office of the Clerk of this Court.

2. That your petitioner is a citizen and resident of the State of New York, and is the owner of $60,000. of First and Refunding Mortgage 5% Gold Bonds of the defendant, Interborough Rapid Transit Company due in 1966, and $35,000. of its Ten Year Secured Convertible 7% Gold Notes which became due on September 1st, 1932, and are now in default. That an order of intervention was granted to your petitioner on September 21st, 1932, upon her petition permitting her to intervene as a party plaintiff in this action. That for the contents of the said petition and order of intervention, reference is made to the said petition and order on file in the Office of the Clerk of this Court.

401

3. Your petitioner avers that the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 25, 1932, designating and assigning himself to hold a District Court of the United States for the Southern District of New York to hear and determine all applications and proceedings in the matter entitled "American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company", and the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 25, 1932, designating himself for a period of thirty days thereafter to hear and determine all applications for the appointment of receivers in equity causes in the United States District Court for the Southern District of New York were each void, irregular, improper and without legal warrant or justification; your petitioner prays that said orders of Hon. Martin T. Manton, U. S. Circuit Judge, be vacated and set aside upon the grounds and allegations set forth in the intervenor's bill of complaint in this cause.

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4. Your petitioner prays that the orders appointing temporary receivers for Interborough Rapid Transit Company, dated August 26, 1932, be vacated and set aside

upon the grounds and allegations set forth in the intervenor's bill of complaint.

5. That your petitioner prays that the order dated September 28, 1932, of Hon. Martin T. Manton, U. S. Circuit Judge, continuing, pendente lite, the Interborough receivership and the appointment of the receivers thereof, and reserving to the said Judge full right and jurisdiction over the said cause and all proceedings thereof, and extending the equity term of this Court by the Hon. Martin T. Manton, U. S. Circuit Judge, until after the final determination and disposition of all matters in the said equity cause, and, in any event, for three years, be vacated, and set aside upon the grounds and allegations set forth in the intervenor's bill of complaint.

6. That your petitioner avers that receivers should be appointed forthwith for the Interborough Rapid Transit Company upon the grounds and allegations set forth in the intervenor's bill of complaint herein.

7. That your petitioner avers that the order of Hon. Martin T. Manton, U. S. Circuit Judge, dated August 26, 1932 appointing Messrs. Chadbourne, Stanchfield & Levy, as Solicitors and General Counsel for the receivers of the Interborough Rapid Transit Company, was and is in violation of the effective Rules and Practice and Procedure of this Court governing the qualifications of solicitors acting for receivers; that your petitioner and intervenor avers upon information and belief, that said designated attorneys for the receivers of Interborough, were during the period of one year prior to the date of August 26, 1932, directly and/or indirectly connected with the Interborough Rapid Transit Company, and Brooklyn-Manhattan Transit Company, their officers, bankers and other persons interested in the cause or interested in the receivership estate, as is more fully set forth in the bill of complaint herein.

406 *Petition of Lillian Boehm.*

8. That your petitioner and intervenor believes and therefore avers that the importance and significance of this order to show cause makes it advisable that it be heard by this Court sitting *en banc.*

WHEREFORE, your petitioner and intervenor respectfully asks that the prayers for relief contained in her supplemental bill of complaint herein, and in this order to show cause, be granted by this Honorable Court, and that receivers of Interborough Rapid Transit Company be appointed as prayed for.

407 That no previous or other application has been made for this relief, herein sought, by the intervenor.

The reason why this order to show cause is made returnable in less than the usual time is that an order to show cause upon the petition of the complainant herein has been granted and made returnable on October 4th, 1932, before this Court, praying for similar relief as stockholder of the defendant, Manhattan Railway Company, and it is essential to the interests of the complainant and this intervenor, and all others similarly situated, and advisable in the determination of the common questions raised in both orders to show cause, that both motions be heard and determined simultaneously.

408 Dated, New York, October 3rd, 1932.

LILLIAN BOEHM
Petitioner.

BOEHM & ZEIGER
Solicitor for Intervenor

LILLIAN BOEHM
Office & P. O. Address,
No. 30 Broad Street,
Borough of Manhattan,
New York City.

LOUIS BOEHM
Of Counsel.

## Order Granting Lillian Boehm Leave to Intervene.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

*against*

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

Upon the annexed petition of LILLIAN BOEHM, verified September 21st, 1932, for leave to intervene as a party plaintiff in the above entitled action, and upon the annexed consent of the complainant herein, it is hereby

ORDERED, that LILLIAN BOEHM be, and she hereby is, permitted to intervene as a party plaintiff in the

412 *Order Granting Lillian Boehm Leave to Intervene.*

above entitled action upon such terms and conditions as the Court may hereafter impose, complainant agreeing, however, that counsel fees shall not be chargeable to the intervenor by plaintiff or plaintiff's attorney or counsel.

Dated, New York, September 21st, 1932.

FRANCIS G. CAFFEY
United States District Judge.

413 We do hereby consent to the entry of the foregoing order.

Dated, New York, September 21st, 1932.

CHARLES FRANKLIN
Attorney for Complainant.

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## Petition of Lillian Boehm For Leave To Intervene.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

*against*

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of LILLIAN BOEHM respectfully shows and alleges:

1.—I am the owner of 1400 shares of the capital stock of the defendant, MANHATTAN RAILWAY COMPANY, having a par value of $140,000. I have been the owner of said stock for more than a year last past. I am also the owner of $117,000. par value of first mortgage 4% bonds of the defendant, MANHATTAN RAILWAY COMPANY, due in April,

1990, which I have also owned for more than a year last past.

2.—I am and have been for more than a year last past the owner of $60,000. first and refunding 5% bonds of the defendant Interborough Rapid Transit Company, due in 1966, and am also the owner of $35,000. of its 7% secured bonds due on September 1st, 1932, and now in default.

3.—The above entitled action is brought by the complainant, a stockholder of the defendant, MANHATTAN
419 RAILWAY COMPANY (hereinafter called Manhattan), on behalf of himself and all other stockholders who may see fit to join in said suit, for the benefit of the defendant, MANHATTAN, for an accounting of all sums due and owing to the defendant, MANHATTAN, by the defendant, INTERBOROUGH RAPID TRANSIT COMPANY (hereinafter called Interborough), for the determination of the amount due by the Receivers of INTERBOROUGH to MANHATTAN for the use and occupation of MANHATTAN's properties, for the damages caused by the breach of the lease between MANHATTAN and INTERBOROUGH, or, in the alternative, for specific performance of said lease, for a determination of the respective rights and obligations of
420 MANHATTAN and INTERBOROUGH, for the vacation of the order of the Honorable Martin T. Manton, Circuit Judge, appointing himself as District Judge to hear the application for a receiver of the INTERBOROUGH, and for the vacation of his order appointing himself as an additional District Judge to hear all applications for appointment of receivers in equity causes in this District, for the vacation of the order entered August 26th, 1932, appointing temporary receivers for the INTERBOROUGH in the case of the American Brake Shoe & Foundry Co. *v.* Interborough, et al (E 70-374), for the vacation of the order made September 6th, 1932, appointing a temporary

receiver for MANHATTAN in the same case, and for the appointment of separate and independent receivers of the properties of MANHATTAN and of INTERBOROGH, respectively, and that the same be administered under the direction of this Court.

Your petitioner has had stated to her the substance of the complaint in the above entitled case, and is familiar with the facts therein alleged, and states, upon information and belief, that the facts and allegations therein contained are true as stated therein. Petitioner desires to intervene in said action and to become a party plaintiff thereto.

An order to show cause has been made herein requiring the defendants to show cause before this Court on September 23rd, 1932, why an order should not be made and entered herein appointing receivers of and for the property, assets, funds, business and records in the State of New York, of the defendants MANHATTAN, and INTERBOROUGH, respectively, pending the trial of this action, and enjoining and restraining the defendants from in any manner disposing of the money, property, assets, funds and business of the defendants, MANHATTAN and INTERBOROUGH, respectively.

WHEREFORE, your petitioner prays for an order permitting her to intervene as a party plaintiff in the above entitled action.

Dated, New York, September 21st, 1932.

LILLIAN BOEHM

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**Order Granting Manhattan Common Stockholders' Protective Committee Leave to Intervene.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

*against*

425 MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

E 71-153

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Upon the annexed petition of Manhattan Railway Company Common Stockholders' Protective Committee, verified September 24, 1932, by said Committee, Brookin Corporation, and Llewellyn Hernly, for leave to intervene as party plaintiffs, on behalf of Manhattan Railway Company Common Stockholders' Protective Committee, composed of Nathan L. Amster, Chairman, Morton F. Stern, Hon. Peter Ten Eyck, C. R. Jeffers, Secretary, Blin W. Page and Charles Franklin, attorney for said Committee, in the above-entitled action, and on

behalf of Brookin Corporation and Llewellyn Hernly, who have deposited their stock with said Committee, it is hereby

ORDERED, (1) that the petitioners herein be and hereby are permitted to intervene as party plaintiffs on behalf of the Manhattan Railway Company Common Stockholders' Protective Committee, and represent all owners and holders of Manhattan Railway Company Common Stock who may deposit said stock with said Protective Committee in the above-entitled action upon such terms and conditions as to the court may appear just and proper; and

(2) that all notices of further motions and proceedings in the above-entitled cause shall be served on Charles Franklin, No. 165 Broadway, Borough of Manhattan, City of New York, counsel for said Protective Committee, pursuant to rules and practices of this court.

Dated, New York, Sept. 26, 1932.

FRANCIS G. CAFFEY
U. S. D. J.

CW

430 **Petition of Manhattan Railway Company's Common Stockholders' Protective Committee for Leave to Intervene.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

*against*

431 MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

432

TO THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of Manhattan Railway Company's Common Stockholders' Protective Committee, composed of Nathan L. Amster, Chairman, Morton F. Stern, Hon. Peter Ten Eyck, C. R. Jeffers, Secretary, Blin W. Page, and Charles Franklin, attorney for said Committee, as a protective committee acting for Manhattan Railway Company Common Stockholders, on behalf of themselves and on behalf of Brookin Corporation and Llewellyn

*Petition of Manhattan Railway Company's Common Stockholders' Protective Committee for Leave to Intervene.*

Hernly, who have deposited their stock with said Committee, and on behalf of all other holders of such stock who may deposit their stock with the Protective Committee, respectfully shows as follows:

1. That the Protective Committee has been formed for the purpose of protecting the interests of all holders of the Manhattan Railway Company's Common Stock who shall deposit their stock with the Protective Committee.

2. The undersigned members of the Protective Committee themselves represent about 100,000 shares of the stock having a par value of $10,000,000; that Brookin Corporation, a Delaware corporation, is the holder of 3,000 shares having a par value of $300,000, and has deposited said stock with said Committee, as has Llewellyn Hernly, a holder of 500 shares having a par value of $50,000. Other holders of large amounts of the stock have also agreed with the Protective Committee to deposit their stock with the designated depository of the Protective Committee. The Protective Committee has called for the deposit of stock, and a published notice to that effect will shortly appear.

3. On September 21, 1932, a suit in equity was brought by Benjamin F. Johnson, one of the common stockholders of Manhattan Railway Company, wherein and whereby Johnson asked to have the present appointment of the receivers of Interborough Rapid Transit Company, namely, Hon. Victor J. Dowling and Mr. Thomas E. Murray, Jr., and the receiver of Manhattan Railway Company, Mr. William Roberts, vacated and set aside as irregular, null, and void, and without legal effect, and that proper and independent receivers be appointed for said Interborough Rapid Transit Company and Manhattan Railway Company.

436 *Petition of Manhattan Railway Company's Common Stockholders' Protective Committee for Leave to Intervene.*

4. Your petitioners are informed and believe that numerous questions of great importance, vitally affecting the interests of the stock represented by the Protective Committee, will be raised in the above-entitled cause, and will come before this court for its decision thereon. Your petitioners refer to the bill of complaint herein of Benjamin F. Johnson, plaintiff (E 71-153), wherein the facts with regard to certain of these matters are set forth at length.

437 5. Your petitioners, as such Protective Committee, allege that, in view of the importance to the stock which they represent of the questions which shall arise from time to time in this case, they should be permitted to intervene in this cause.

Wherefore, your petitioners pray that an order be entered herein, permitting your petitioners, as the Protective Committee acting for the Manhattan Railway Company common stockholders, to intervene as party plaintiffs in this cause, with the right to plead on behalf of the holders of said stock, and to be heard on all matters arising on this cause, and that your petitioners be
438 entitled to notice of all proceedings herein, and that your petitioners have such other and further relief as to this court may seem just and proper.

Dated, New York, September 24, 1932.

Nathan L. Amster, Chairman,
Morton F. Stern,
Hon. Peter Ten Eyck,
C. R. Jeffers, Secretary,
Blin W. Page, and
Charles Franklin
As the Protective Committee for
Manhattan Railway Company
Common Stockholders
By Charles Franklin,
Attorney.

## Petition for Contingent Intervention by Harold Palmer and Others as the Protective Committee for Holders of Manhattan Seven Per Cent. Guaranteed Stock.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

*against*

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court, VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY
E-71-153-1932

TO THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK:

FIRST: Your petitioners, Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, all of whom may be hereinafter referred to as the Protective Committee, are the same petitioners who, in the cause pending in this Court numbered E-70-364, entitled The American Brake Shoe and Foundry Company *vs.* Interborough Rapid Transit Company, and acting as a Protective Committee for the Seven Per Cent. Guaranteed Stock of Manhattan Railway Company (hereinafter called Manhattan), petitioned this Court by

442 *Petition for Contingent Intervention by Harold Palmer and Others as the Protective Committee for Holders of Manhattan Seven Per Cent. Guaranteed Stock.*

petition dated September 8, 1932, and by amended and substituted petition dated September 12, 1932, for leave to intervene, and to whom, by order of September 28th, 1932, his Honor Judge Martin T. Manton sitting in this cause, allowed intervention therein, said petition, motion and order, being now incorporated herein by reference, unless the Court should otherwise direct, for their being considered in this Court as a basis for relief as prayed hereunder; and your petitioners further respectfully
443 state:

SECOND: 1. That, as set forth in paragraphs 18 to 24 of the bill of complaint herein, the 600,000 shares of Manhattan stock are in two separate, and, on information and belief, mutually antagonistic classes, namely, (a) the 556,490 shares called "modified stock" (of which the complainant, Benjamin F. Johnson, on information and belief, owns the 100 shares mentioned by him in his bill of complaint herein) which in May, 1922 surrendered their right under Manhattan's lease of January 1, 1903, to Interborough to receive from Interborough an annual payment of $7.00 per share; and (b) the 43,510 shares
444 of what is called "seven per cent. guaranteed stock" which has never surrendered said right to receive from said Interborough said annual payment of $7.00 per share, of which said class of 43,510 shares of guaranteed stock the Protective Committee, petitioners herein, having made its first call for deposits on September 26, 1932, now hold or represent between 9,000 and 10,000 shares, and expect within a reasonable time to enlist many more shares.

2. That said obligation of Interborough under said lease to holders of seven per cent. guaranteed stock as set forth in the Protective Committee's said petitions in cause numbered E-70-364, is an obligation which, as

established by the Courts of New York, runs directly from Interborough to each stockholder of Manhattan so that such stockholder may properly sue Interborough to enforce the same without impleading Manhattan as a party to such suit; and that said obligation, being an express obligation to make such seven per cent. annual payments as part rental for the Manhattan properties, is, and has for years been treated by Interborough as being, an operating charge prior to any claim of any secured or unsecured creditor, or of any stockholder of Interborough, or of any bondholder of Manhattan; and that any Receivers of Interborough using or occupying the properties of Manhattan are obligated to pay said seven per cent. upon said guaranteed stock as such prior operating charge to the holders thereof.

3. That as set forth by the Protective Committee in its said petitions for intervention in said cause E-70-364, Manhattan itself, under said Manhattan-Interborough lease of January 1, 1903, was to receive directly as rental only $10,000 in cash per annum, namely, less than 1/100th of one per cent. of the capital invested in Manhattan's properties, the balance of said rental being expressly payable, *as rental,* by Interborough directly in the form of (a) taxes, assessments, etc., (b) an annual dividend of seven per cent. on each share of Manhattan stock, and (c) interest on all bonds of Manhattan; that on information and belief, before said modifying agreement of May 1, 1922, mentioned in section one of this paragraph Second, Interborough was making annual payments aggregating about $4,200,000 in such dividend rentals, and about $1,800,000 in four per cent. interest on Manhattan's outstanding bonds, a total in such dividend and interest rentals of about $6,000,000; that by the terms of said modification agreement of May, 1922, said total of annual dividend rentals was reduced by about

448 *Petition for Contingent Intervention by Harold Palmer and Others as the Protective Committee for Holders of Manhattan Seven Per Cent. Guaranteed Stock.*

$3,900,000; thus leaving payable annually by Interborough in dividend and interest rental the sum of about $2,100,000 of which only about $304,570 is now payable annually to the holders of Manhattan seven per cent. guaranteed stock.

4. That as set forth in section 3 of this paragraph Second, Manhattan itself receives no real consideration whatever under said lease and is not actually interested in protecting it from disaffirmance or from default at
449 the hands of the Receivers of Interborough, whoever they may be; that the holders of Manhattan four per cent. mortgage bonds are, on information and belief, adequately protected by their security, and that the complainant Benjamin F. Johnson and the other holders of over ninety per cent. of Manhattan stock, namely, the "modified stock", as to which the right to dividend rentals has been so surrendered, are, on information and belief, not interested in preventing disaffirmance of said Manhattan-Interborough lease, or any default thereunder, but, on the contrary might benefited by such disaffirmance or default, and in equity can, therefore, not
450 represent the interest of the seven per cent. guaranteed stock under said Manhattan-Interborough lease; that on information and belief Interborough or its Receivers have funds amply adequate to pay the quarterly instalment of guaranteed rental dividends of $1.75 per share, —namely, $76,142.50, out of funds on hand which exceed $4,000,000, but that there are no creditors, secured or unsecured, or stockholders of Interborough who are interested in, or who would favor payment thereof; and that your petitioners believe that some of such creditors and stockholders are prepared to oppose and obstruct, such payment, and to lend support to any proposal by Receivers of Interborough that said Manhattan-Interborough lease be disaffirmed; that your petitioners be-

lieve and state that Interborough and its Receivers, both in law and equity are, and while operating Manhattan's properties, will continue to be, obligated to the holders of said seven per cent. guaranteed stock for said dividend rentals under said lease.

*Third:* That if, upon the motion of the complainant herein, Benjamin F. Johnson, this Honorable Court should vacate and set aside certain orders heretofore entered in said cause E-70-364 appointing Receivers for Interborough and should appoint another receiver or other receivers for Interborough, or should through a regularly incumbent District Court Judge, take control of the present Receivers of Interborough, then, the rights and interests of your petitioners and those whom they now represent and will hereafter come to represent, could not, as your petitioners believe and state receive proper protection unless your petitioners as such Protective Committee should be allowed by order of this Court to intervene and become parties to this proceeding, and thus (a) receive notice of, and have opportunity to be heard on, any proposed course by such new Receiver or of this Court relating to payment or non-payment of said October 1st instalment of guaranteed rental, or (b) to be able themselves to bring up to the Court for submission their contention that such instalment should as an operating charge be paid by the Receivers of Interborough, or any default thereon be cured by them.

*Fourth:* That if an order or orders of the character or scope mentioned in paragraph Third above of this petition should be entered by this Court, then your petitioners seek herein an order of this Court allowing your petitioners, as such Protective Committee, to intervene as a party defendant in this proceeding to assert

454 *Petition for Contingent Intervention by Harold Palmer and Others as the Protective Committee for Holders of Manhattan Seven Per Cent. Guaranteed Stock.*

their rights as hereinbefore set forth, strictly in subordination to the main proceeding herein, and would ask that this petition, as it now stands or as it may be amended, be, after such order allowing intervention shall have been entered herein, treated as their cross-petition against said Intrborough and such receiver or receivers thereof as this Court may appoint or come to recognize.

Wherefore, if orders should be entered in this cause of the character or scope mentioned in paragraph Third
455 hereof, your petitioners pray that this Court, upon entry of such order or orders, will also enter a further order permitting your petitioners as the Protective Committee for holders of Manhattan Railway Company seven per cent. guaranteed stock, to intervene as a party defendant in this cause, and for such other and further relief to it and to those whom it may represent or may hereafter come to represent, and to all such stockholders, as to this Court may seem proper.

Dated, September 29, 1932.

Marshall & Wehle,
Louis B. Wehle,
456 Solicitors.

Harold Palmer,
Norman Johnson,
Stanley R. Latshaw,
Harold Swain,
John W. Appel, Junior,
as the Protective Committee
for Seven Per Cent. Guaranteed Stock of Manhattan
Railway Company
by Harold Palmer,
Chairman
Norman Johnson,
Secretary.

## American Brake Shoe Bill of Complaint.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

*To the Judges of the District Court of the United States for the Southern District of New York:*

The plaintiff, The American Brake Shoe and Foundry Company, a corporation duly organized and existing under the laws of the State of Delaware, and a citizen of said state, brings this, its Bill of Complaint, on its behalf and on behalf of all other creditors of the Interborough Rapid Transit Company, the defendant, who may hereafter join in the prosecution of this suit, against the Interborough Rapid Transit Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen of said state, resident in the Southern District of New York, and thereupon plaintiff alleges as follows:

460 *American Brake Shoe Record: Bill of Complaint.*

FIRST: The plaintiff, The American Brake Shoe and Foundry Company, is a corporation duly organized and existing under the laws of the State of Delaware, and a citizen and resident of said state.

SECOND: On information and belief, that the defendant was at all times hereinafter mentioned, and is now, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and a citizen of said state, having its principal office in the City of New York, and a resident of the Southern District of New York.

THIRD: That this is a suit of a civil nature in equity; that the matter in dispute exceeds the sum of Five thou-
461 sand ($5,000) Dollars, exclusive of interest and costs, and is between citizens of different states.

FOURTH: On information and belief, that the defendant, Interborough Rapid Transit Company, is a railroad corporation duly formed on or about May 6, 1902, under and in pursuance of Chapter 565 of the laws of 1890 of the State of New York, known as the Railroad Law, and the acts amendatory thereof and supplemental thereto, and pursuant to the provisions of Chapter 544 of the laws of 1902 of the State of New York, being an Act entitled "An Act to Amend Chapter 4 of the Laws of 1891, entitled 'An Act to Provide for Rapid Transit Railways in Cities of Over One million Inhabitants,'" for the pur-
462 pose, among others, of equipping and operating rapid transit railroads in the City of New York.

FIFTH: On information and belief, that on or about February 21, 1900, the City of New York, acting by the Board of Rapid Transit Railroad Commissioners, entered into a contract with John B. McDonald (known as Contract No. 1) for the construction, at the expense of the City, and for the equipment, maintenance and operation of certain rapid transit lines, subway and elevated, in

the Boroughs of Manhattan and the Bronx, in said city, known as the "Manhattan-Bronx Rapid Transit Railroad," which said contract, including the provisions thereof relating to the equipment, maintenance and operation of said railroad, was subsequently duly assigned to defendant in the manner required by law.

On information and belief, that on or about July 21, 1902, the City of New York, acting by the Board of Rapid Transit Railroad Commissioners, under the Rapid Transit Act, entered into a contract with Rapid Transit Subway Construction Company (known as Contract No. 2) for the construction, at the expense of the City, and for the equipment, maintenance and operation of certain rapid transit subway lines in the Boroughs of Manhattan and Brooklyn in said city, known as the "Brooklyn-Manhattan Rapid Transit Railroad," which said contract, including the provisions thereof relating to the equipment, maintenance and operation of said railroad, was subsequently duly assigned to the defendant in the manner required by law.

On information and belief, that on or about March 19, 1913, the City of New York, acting by the Public Service Commission for the First District, under the Rapid Transit Act, entered into a contract with defendant (known as Contract No. 3) for the construction by the City, in part at the expense of said City, and in part at the expense of the defendant, of certain rapid transit lines in the Boroughs of Manhattan, Bronx, Queens and Brooklyn, and for the equipment, maintenance and operation of the rapid transit lines to be constructed under said contract in conjunction with said Manhattan-Bronx Rapid Transit Railroad and said Brooklyn-Manhattan Rapid Transit Railroad then operated by the defendant under said Contract No. 1 and under said Contract No. 2.

On information and belief, that the defendant is now engaged in the maintenance and operation of all of said rapid transit railroads, including the new lines constructed

under said Contract No. 3, so far as the same have been completed by the City of New York.

On information and belief, the said system of rapid transit railroads now maintained and operated by the defendant under said contracts, consists of more than seventy-six (76) miles of continuous railroad, and more than two hundred sixty-two (262) miles of single track in all boroughs of the City of New York except the Borough of Richmond, and the defendant employs more than eighteen thousand men.

SIXTH: On information and belief, that on or about January 1, 1903, by indenture of lease bearing said date,
467 Manhattan Railway Company, a railroad corporation organized and existing under the laws of the State of New York, owning a system of elevated railroads in the Boroughs of Manhattan and the Bronx, of the City of New York, leased the said system of elevated railroads to the defendant for the term of nine hundred and ninety-nine (999) years from November 1, 1875, upon the terms and conditions, and for the rentals in said indenture of lease set forth.

On information and belief, that on or about March 19, 1913, the Public Service Commission for the First District issued to said Manhattan Railway Company, and said Manhattan Railway Company accepted, a certain certificate for the construction, equipment, maintenance and
468 operation of certain additional tracks to certain elevated lines of said Manhattan Railway Company, and that said additional tracks have been constructed and equipped and are now operated by the defendant under said lease.

On information and belief that on or about March 19, 1913, the Public Service Commission for the First District issued to the defendant, and the defendant accepted, a certain certificate for the construction, equipment, maintenance and operation of certain extensions to the elevated lines, or some of them, operated by the defendant under

said lease; and that said elevated extensions have been constructed and equipped and are now operated by the defendant under the terms of said certificate in conjunction with, and as a part of the elevated system leased by the defendant from said Manhattan Company.

On information and belief, that said elevated railroad system, including said additional tracks and elevated extensions now operated by the defendant, consists of more than forty-one (41) miles of railroad and more than one hundred thirty-seven (137) miles of single track in the Boroughs of Manhattan and the Bronx, in the City of New York.

SEVENTH: On information and belief, that the cost to defendant of the Elevated third tracks, Elevated Extensions and Manhattan power plant improvements constructed and furnished in accordance with the provisions of the aforesaid Manhattan and Interborough Certificates each granted March 19, 1913, is in excess of $44,000,000, all of which cost was provided from the proceeds of the sale of bonds and notes issued by defendant.

EIGHTH: On information and belief, that in and by the documents and agreements which taken together are known and described as the "Interborough-Manhattan Readjustment Plan of 1922," among other things, it was provided that as to all holders of capital stock of Manhattan Railway Company who might assent to and participate in such Plan the 7% annual rate of guaranteed dividend rental on such capital stock as fixed in the aforesaid lease from the Manhattan Railway Company to defendant should be reduced, after July 1, 1924, to the rate of 5% per annum and should be payable only if and to the extent earned by defendant in the manner in said Plan provided; that the holders of more than 90% of the outstanding capital stock of Manhattan Railway Company assented to said Plan and agreed to accept said reduced rent; that the reduced dividend rental on said capital stock of Manhattan

Railway Company as and when earned at the rates provided in the said Readjustment Plan has been paid by defendant; that the Manhattan Railway Company has formally expressed its dissatisfaction with accounts of defendant for the period subsequent to June 30, 1928, and has claimed that the dividend rental on its stock for such period is greater than the payments which defendant has made.

NINTH: On information and belief, that under said Contract Nos. 1, 2 and 3, it is, among other things, provided that in case the defendant shall be in unexcused default in the payment of the rental, or in the performance
473 of any other of the obligations of said contracts, and any such default shall continue for the period or periods therein stated, the said contracts may be terminated on the terms and conditions therein set forth.

On information and belief, that under the said lease from Manhattan Railway Company and the said Interborough-Manhattan Readjustment Plan it is, among other things, provided that in case the defendant shall fail to pay the rent provided for in said lease, as reduced in accordance with the provisions of said Plan, and such default shall continue for the period therein stated, the leasehold estate thereby created may be terminated.

TENTH: On information and belief, that the defendant has an authorized capital stock issued and outstanding
474 of Thirty-five million dollars ($35,000,000); that all of the equipment provided by the defendant under said Contracts Nos. 1 and 2, including the power houses, sub-stations and rolling stock provided under said contracts and all the right, title and interest of the defendant in said contract number 3, said lease from the Manhattan Railway Company and the said certificate for elevated extensions issued to the defendant and certain other property and assets of the defendant have been heretofore pledged under and are now subject to the First and Refunding Mortgage

of the defendant, dated March 20, 1913, to Guaranty Trust Company of New York as Trustee, under which there are now issued and outstanding in the hands of the public bonds to the principal amount of more than One hundred and thirty-two million ($132,000,000) dollars, and under which there are now outstanding bonds to the additional amount of more than Fifty-four million dollars ($54,000,000), pledged to secure an issue of Ten Year Secured Convertible 7% Gold Notes of the defendant, due September 1, 1932, of which there are outstanding, in the hands of the public, notes to the principal amount of Thirty-one million, six hundred and seventy-two thousand one hundred dollars ($31,672,100); that there are also issued and outstanding in the hands of the public defendant's Unsecured Ten Year Six per cent. Gold Notes, due October 1, 1932, in the principal amount of Ten Million five hundred thousand dollars ($10,500,000); that interest on said First and Refunding Mortgage 5% Gold Bonds of the defendant is due and payable on the first days of January and July in each year; that interest on said Ten Year Secured Convertible 7% Gold Notes is due and payable on the first days of March and September in each year; and that interest on said Unsecured Ten Year Six per cent. Gold Notes is due and payable on the first days of April and October in each year.

ELEVENTH: On information and belief, the lease from said Manhattan Railway Company provides that the defendant shall pay rental for the elevated lines demised by said lease, in addition to all taxes on the lessor and its property, the following:

> Seven per cent. (7%) per annum on the authorized and outstanding capital stock of said Manhattan Railway Company to the aggregate par value of Sixty million dollars ($60,000,000), payable quarterly to the owners of record of the shares of said stock, on the first days of January, April, July and October in each

478 *American Brake Shoe Record: Bill of Complaint.*

year, but as to 556,490 shares of said capital stock the dividend rental rate has been reduced to 5% per annum, payable if earned, as hereinabove.

Four per cent. (4%) per annum on the Consolidated Mortgage 4% bonds of said Manhattan Railway Company of which Forty million six hundred and eighty-three thousand dollars ($40,683,000), are now outstanding, payable semi-annually on the first days of April and October in each year.

Four per cent. (4%) per annum on the Second Mortgage Bonds of said Manhattan Railway Company of which Four million five hundred and twenty-three
479 thousand dollars ($4,523,000) are now outstanding, payable on the first days of June and December in each year.

TWELFTH: Plaintiff is informed and believes that the defendant is and will be unable to pay at maturity its Ten-Year Secured Convertible 7% Gold Notes due September 1, 1932, and this plaintiff alleges that some of the over five thousand noteholders may bring suits in respect of their said notes and may levy execution on the equipment and property of the defendant used in the operation of said rapid transit subway and elevated lines; that failure to meet the interest on said First and Refunding Mortgage 5% Gold Bonds when due may operate as a
480 default under the mortgage securing the same and render such mortgage enforceable; and that failure to pay the interest when due on said bonds of Manhattan Railway Company may operate as a default under said lease and upon the expiration of the period of grace therein provided will render the same terminable; and that failure to pay each installment of rental under said lease, when due, payable to the holders of 43,510 shares of the stock of said Manhattan Railway Company, who did not assent to the Readjustment Plan of 1922, may also operate as a default under said lease and will subject the defendant to innumer-

able actions by the holders of said stock to collect the same by reason of the guarantee by the defendant of the payment of such rental when due to each of the holders of such stock.

THIRTEENTH: On information and belief, that defendant has failed and neglected to pay certain taxes for 1928 and 1929 duly assessed by the City of New York against various parcels of real estate owned by defendant and subject to the lien of its First and Refunding Mortgage, and that such unpaid taxes with the interest now due thereon amount in the aggregate to more than $480,000; that defendant's failure to pay such real estate taxes as and when the same became due, or within a period of ninety (90) days thereafter, constitutes an act of default (which has continued down to date), under the provisions of defendant's First and Refunding Mortgage and makes it subject to an action to foreclose the lien of said Mortgage.

On information and belief, that defendant has neglected and failed to pay certain taxes for 1932 duly assessed by the City of New York against the special franchises and real estate belonging to the Manhattan Railway Company, the amount of such unpaid taxes with interest now due thereon being in excess of $860,000; that defendant's lessor, Manhattan Railway Company, has formally demanded in writing that such taxes be paid but that defendant has neglected and failed and continues to neglect and fail to comply with such demand and make such payment; on information and belief that such failure and such refusal constitutes an act of default on the part of the defendant under the aforesaid lease from the Manhattan Railway Company and if continued for a period of ninety (90) days from the date of demand of the Manhattan Railway Company, will constitute an additional act of default under the terms of the defendant's First and Refunding Mortgage.

FOURTEENTH: On information and belief, that the Transit Commission, being the Metropolitan Division of Public Service of the State of New York, purporting to act in its regulatory capacity, or as agent of the City of New York under Contract No. 3, or both, by order dated April 30, 1930, directed the defendant to provide 289 new steel cars ready for subway operation not later than October 1, 1931, together with the necessary power equipment; that thereafter on September 4, 1930, the aforesaid Transit Commission commenced an action or proceeding against the defendant, under the Rapid Transit Act and Section 57 of the Public Service Law, for the enforcement
485 of said order in the Supreme Court, State of New York, which action or proceeding is still pending and is now set down for trial on October 3, 1932; that the cost to defendant of compliance with the aforesaid order of the Transit Commission would be approximately $8,000,000.

On information and belief, that the Transit Commission, being the Metropolitan Division of Public Service of the State of New York, purporting to act in its regulatory capacity or as agent of the City of New York under Contract No. 3, or both, by order dated April 21, 1926, directed the defendant to lengthen certain of its subway local station platforms and furnish in connection therewith 382 new steel subway cars for operation together with the necessary power equipment; that for the purpose of carrying out said order the said Transit Commission
486 acting as aforesaid, by a supplemental order dated December 31, 1927, directed the defendant to lengthen certain local subway station platforms among others at Canal Street and Spring Street and on September 4, 1930, commenced an action or proceeding against defendant, under the Rapid Transit Act and under Section 57 of the Public Service Law, in the Supreme Court, State of New York, for the enforcement of said supplemental order of December 31, 1927, which action or proceeding is still pending and is now set down for trial on October 3, 1932; that

said order of December 31, 1927, is supplemental to the order of April 21, 1926, and is one step in carrying out the same; that the cost to defendant in carrying out said order of April 21, 1926, would be approximately $20,000,000.

On information and belief, that the Transit Commission, being the Metropolitan Division of the Public Service of the State of New York, by order dated June 29, 1927, directed the defendant to install a certain signal system upon its subway and elevated lines, which said order was duly accepted; that this installation was to be consummated year by year; and that following the terms of said order the cost of the remaining signal installation year by year would be approximately as follows: for fiscal year ended June 30, 1933, $720,000; 1934, $980,000; 1935, $1,750,000; 1936, $3,510,000; 1937, $3,000,000.

On information and belief, that defendant presently is without funds to enable it to comply with any of the aforesaid orders or directions, if enforced, and has no means of obtaining such funds.

On information and belief, that the aforesaid Transit Commission, acting as agent for the City of New York, has questioned the propriety and legality of certain charges which the defendant has made against subway revenues and included within operating expenses for the two years ended June 30, 1931, and that the total of the items so questioned is in excess of $811,000; that the said Transit Commission has indicated its intention of filing with the defendant formal objections to the items so questioned and that it may file such objections at any time; that under the provisions of Contract No. 3, if, as and when any such objections are filed with the defendant the latter is obliged to forthwith transfer the amount of such items to a special suspense account and if it is subsequently determined, in the manner provided in the Contract, that the objections are well founded, then the defendant is obliged to return to subway revenues any and all amounts so found to have been erroneously, improperly, or illegally charged against such revenue.

FIFTEENTH: That the defendant is indebted to the plaintiff in the sum of Twenty-seven thousand five hundred thirty and eighty-nine one-hundredths dollars ($27,530.89), for brake shoes and miscellaneous castings furnished and supplied by plaintiff to the defendant at the request of the defendant and for which the defendant agreed to pay plaintiff said sum; that payment of said sum has been duly demanded by plaintiff from the defendant, but refused, and the same is now wholly due and unpaid; that said materials were so supplied to the defendant for the purposes of the operation of its system of elevated and rapid transit subway lines and to enable the defendant to comply with and fulfill its obligations under said con-
491 tracts, certificates and lease, and to fulfill the duty which the defendant owes toward the public, and to discharge the obligations of the defendant and of said Manhattan Railway Company under the contracts, certificates and franchises for the operation of their respective lines, and that the materials were used for the purposes aforesaid.

On information and belief, that the defendant has outstanding floating indebtedness for materials, equipment, taxes and supplies to the amount of over Two million five hundred thousand ($2,500,000.00) Dollars; that said floating indebtedness is now overdue; that the defendant is unable to pay the same; and that the holders thereof are pressing for payment thereof; that some of said creditors may bring suits in respect of their said claims and may
492 levy execution on the equipment and property of the defendant used in the operation of said rapid transit subway and elevated lines and on the material and supplies and other property of defendant on hand and kept by the defendant for necessary use in operating said railway systems, and plaintiff alleges that there is grave danger that the defendant may thereby be deprived of the use of equipment, rolling stock and other property essential to the effective and economical operation of the said railroad systems, and that there is likewise grave danger that suits may be instituted against the defendant in respect

of the claims above stated, and that it is essential to the interest of all the creditors of the defendant and to the interest of the public and of the plaintiff that the property of the defendant should not be sacrificed; that the position of defendant, and therefore of all the creditors of the defendant, including the plaintiff, is rendered more insecure by reason of the present bad financial situation of public service corporations generally and the general financial depression.

On information and belief, that defendant is and will be without financial resources to meet in full the following contractual obligations which are required of it because of the terms of its Mortgage, the Indenture securing its Notes, and the Manhattan lease:

(a) six months' interest on its Ten Year Secured Convertible 7% Gold Notes, due and payable September 1, 1932, amounting to $1,108,523.50;

(b) the principal of said Ten Year Secured Convertible 7% Gold Notes, due and payable September 1, 1932, amounting to $31,672,100;

(c) six months' interest on the Unsecured Ten Year Six per cent. Gold Notes, due October 1, 1932, amounting to $315,000;

(d) the principal of said Unsecured Ten Year Six per cent. Gold Notes, due and payable October 1, 1932, amounting to $10,500,000;

(e) rental payments due under the lease from Manhattan Railway Company, amounting to $914,802.50, on October 1, 1932, being interest on the Manhattan 4% Bonds and rental for one quarter on the non-assenting Seven per cent. Stock of the Manhattan Company;

(f) rental payments due under the said Manhattan lease on December 1, 1932, amounting to $90,460;

(g) the interest and sinking fund due on defendant's First and Refunding Mortgage 5% Gold Bonds, due on January 1, 1933, in an amount in excess of $4,400,000.

SIXTEENTH: On information and belief, that the only means whereby the defendant can meet its obligations under said contracts, certificates and leases, and pay its floating indebtedness and discharge its current obligations is by the continued maintenance and operation of said railroads by an uninterrupted use thereof; and that any suits upon or process against its properties or its revenues would seriously embarrass and cripple the defendant and
497 diminish, if not destroy, its power successfully to operate said railroad systems; that said railroad systems, together with all their appurtenances, rolling-stock and other property connected therewith, are now in a reasonably good state and condition; that during the last year the elevated and rapid transit subway lines operated by the defendant carried over 1,000,000,000 passengers, and that it is of vital importance to the people of the City of New York that said elevated and rapid transit subway lines shall continue to be operated and to such end it is of like importance that said systems be preserved; that notwithstanding the fact that every effort has been made to provide funds for the payment of the indebtedness of the defendant, and to procure additional income and revenues
498 from the operation of said elevated and rapid transit subway lines, such efforts have proved unsuccessful; that unless some definite action is taken on behalf of all the creditors so that the operation of said railroads may be continued, great and severe loss and irreparable injury will be inflicted upon all creditors; that the credit of the defendant has been seriously impaired; and that it has no reasonable hope of finding assistance from any quarter.

On information and belief said defendant has assets which at a fair valuation exceed the amount of its liabilities; the defendant is unable to pay or provide for the payment of its obligations now due and will be unable

to meet its obligations in the ordinary course of its business as they become due.

Plaintiff further alleges on information and belief that unless the Court, in view of the facts above set forth shall take said railroad systems of the defendant into judicial custody for the protection of every interest therein, that immediately upon default, individual creditors, and particularly individual holders of the Ten Year Secured Convertible 7% Gold Notes of the defendant will assert their rights and remedies in different courts; that the result will be a multiplicity of suits and a race of diligence; that attempts will be made to secure judgments and priorities, that levies will be made upon cars, rolling stock, 50
material and supplies indispensable to the operation of said railroad systems which will greatly interfere with and ultimately prevent defendant from the proper performance of its duties as a common carrier and will seriously diminish its earnings.

On information and belief, that an attempt by plaintiff to enforce at law its claims as a general creditor would precipitate similar action on the part of other creditors; and this in turn would lead to wasteful strife and controversy, which plaintiff believes can be avoided and the property preserved for equitable distribution among those entitled thereto, only by the intervention of a Court of Equity and the granting of equitable relief, including the appointment of a receiver, which will lead to a realization for all of the creditors of a substantially larger amount 501
than if such relief were not granted.

SEVENTEENTH: That, under the circumstances, the interference of a Court of Equity for the protection of plaintiff's rights is imperatively required and especially for the time being the appointment of a receiver to take charge of and preserve the property of the defendant, continue the operation of its railroad systems for the accommodation of the public, and collect and receive and properly appropriate the income thereof until the final decree of the Court in the premises.

EIGHTEENTH: Plaintiff has no adequate remedy at law for its aforesaid grievances and can have relief only in equity, and plaintiff, therefore, files this bill of complaint in behalf of itself and other creditors of the defendant who may come in and contribute to the expenses hereof and prays for equitable relief as follows:

1. That the rights of the plaintiff and of all creditors of the defendant may be ascertained and decreed and that the Court will fully administer the fund in which the plaintiff is interested, constituting the entire railroad systems and other assets of the defendant and will for such purpose marshal and administer all the assets of the de-
503 fendant and ascertain the several and respective liens and priorities existing thereon, and enforce by decree the rights, liens and equities of the creditors of the defendant, as the same may be finally ascertained and decreed by the Court.

2. That pending such marshalling and administration and final decrees, for the purpose of preserving intact the property and assets of the defendant a receiver or receivers may be appointed for the defendant and of all the property and assets of the defendant real, personal and mixed of whatsoever kind and description and wheresoever situated, including all railroads, leased or operated, tracks and terminal facilities, rolling stock, franchises, leases, contracts, certificates, rights and properties, with full
504 power to sue for, collect, receive and take into his possession, goods, chattels, credits, rights, moneys, effects, lands, tenements, books, papers and property and assets of every description of the defendant, and with all the incidental powers ordinarily vested in receivers in like cases and with full power and authority to operate the railroads, property and assets of the defendant, and to collect and receive all the rents, issues and profits and income thereof, and to apply the same under the orders or decrees of this Court for such period as the Court shall order, to protect

and preserve the corporate franchises, privileges and property and to preserve the corporate existence of the defendant and to protect and preserve the said railroads, property and assets from being sacrificed under any proceedings which can or may be taken, liable to prejudice or sacrifice the same, and to do any and all acts and things which may be necessary to preserve the valuable rights, contracts and franchises of the defendant or otherwise requisite or proper.

3. That temporarily and pending this suit an injunction may issue against the defendant and all persons claiming and acting by, through and under it, and all other persons, to restrain them from interfering with said receiver or receivers taking possession of said property, and that plaintiff may have such further relief in the premises as the nature of the case may require and as may be agreeable to equity.

4. That the defendant be required to answer all and singular the matters above stated but not under oath, answer under oath being hereby expressly waived.

5. That a writ of subpoena may be granted to the plaintiff to be directed to the defendant thereby requiring said defendant personally to be and appear on a certain day before the Court and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and further to perform and abide by such further order, direction or decree therefor, as to the Court shall seem meet.

6. That plaintiff have such further and other relief as the Court may deem proper and equitable.

BREED, ABBOTT & MORGAN,
Solicitors for Plaintiff.

WINFRED K. PETIGRUE,
of Counsel.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

FRANK H. JANKE, being duly sworn, deposes and says that he is the Assistant Treasurer of The American Brake Shoe and Foundry Company, the plaintiff named in the foregoing bill of complaint; that he makes this affidavit for and in its behalf and is duly authorized to do so; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true; that the sources of deponent's knowledge and the grounds of his belief as to all matters not stated upon plaintiff's own knowledge are as follows: deponent has made inquiries concerning the present condition of the defendant Interborough Rapid Transit Company, and from such inquiries has obtained the information concerning the facts alleged in said bill of complaint upon information and belief.

FRANK H. JANKE.

Subscribed and sworn to before me
this 25th day of August, 1932.

ISAAC DAVIS HALL,
Notary Public,
Queens County.
Queens Co. Clerk's No. 3026, Reg. No. 3131.
N. Y. Co. Clerk's No. 838, Reg. No. 4H514.
Commission Expires March 30, 1934.
(Notarial Seal)

(*Endorsed*)

U. S. District Court
Filed
August 26, 1932
S. D. of N. Y.

**Interborough Answer in American Brake Shoe Case.** 51

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

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| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

51:

INTERBOROUGH RAPID TRANSIT COMPANY, the defendant in this cause, for answer to the bill of complaint herein, or unto so much and such parts thereof as the defendant is advised it is necessary or material for this defendant to make answer, answering says:

FIRST: The defendant admits all the allegations of said bill of complaint.

SECOND: The defendant, reiterating the admissions of the preceding article "First" of this answer, joins in the prayer of said bill of complaint and prays that this Court, sitting in equity, may take possession of the railroad system of the defendant and of all its property and assets through the appointment of a receiver or receivers as prayed in said bill of complaint and thereby protect and preserve the corporate franchises, privileges, property and assets and preserve the corporate existence of the defendant and protect and preserve its said system and its said

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514 *Interborough Answer in American Brake Shoe Case.*

property, real and personal, from being sacrificed under any proceedings which can or may be taken, liable to prejudice or sacrifice the same, and do any and all acts which may be necessary to preserve the valuable rights, contracts, franchises, property and assets of the defendant; and the defendant accordingly prays that inasmuch as there is no adequate remedy at law in the premises for the plaintiff or for this defendant, this Court will, for the purposes aforesaid, appoint a receiver or receivers as prayed for in said complaint, and empower and authorize such receiver or receivers to take possession of the entire property and assets of this defendant and to preserve, manage, operate and control the same, pay all indebted-
515 ness due or to become due by this defendant, and otherwise discharge all the duties ordinarily imposed by courts upon receivers in similar cases; that on the final hearing in this cause this Court will, under said bill of complaint and this answer, or under such supplemental bill as shall be filed herein, make such decree or decrees with respect to the property of this defendant as shall deal with the same on general equitable principles; that this Court will cause all the liens upon the property and assets of this defendant, or upon any part of said property and assets, and all rights and claims in equity of persons interested therein to be ascertained, defined and determined, and that the proceeds arising from the sale of said property and assets, or any part thereof, be applied under the orders
516 or decrees of this Court according to the rights, interests and equities of the parties interested, and that this Court will direct all persons in possession of the property and assets of this defendant, or any part thereof, to surrender the same to such receiver or receivers or to hold such property and assets as such receiver or receivers may direct.

The filing of this answer consenting to the appointment of a receiver in this cause has been duly authorized by resolution of defendant's Board of Directors.

No other action or proceeding praying for the appointment of a receiver of defendant or its property is pending in this or any other Court.

JAMES L. QUACKENBUSH,
Solicitor for Interborough Rapid
Transit Company, Defendant,
Office and Post-Office Address,
165 Broadway,
Borough of Manhattan,
City of New York, N. Y.

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## EXHIBIT A.

EXTRACT FROM THE MINUTES OF THE SPECIAL MEETING OF THE BOARD OF DIRECTORS OF INTERBOROUGH RAPID TRANSIT COMPANY, HELD THURSDAY, AUGUST 25, 1932, AT 4 O'CLOCK P. M.

"The Chairman stated that in view of the maturity of $31,672,100, of the 7% notes of the company on September 1, 1932, which the company would be unable to pay and which probably could not be extended under the terms of the deposit agreement with the committee headed by Mr. J. P. Morgan, or otherwise, it was to be expected that a suit for the appointment of a receiver of the company would probably be instituted in the near future and that in his opinion it would be for the best interest of the company and of its creditors, both secured and unsecured, that its property should be preserved for the benefit of all of its creditors and owners and a multiplicity of lawsuits avoided, whereupon, after full discussion,

520 *American Brake Shoe Record.*
*Exhibit A to Interborough Answer.*

On Motion, duly seconded, the following resolution was adopted:

RESOLVED that in case a suit be instituted against this company for the appointment of a receiver for the purpose of preserving its property for the benefit of all of its creditors, the proper officers be and they hereby are authorized and directed upon the advice of the General Counsel to interpose a duly verified answer in such suit in such form as shall be approved by the General Counsel of the company and which shall admit such allegations of the bill of complaint, as in his opinion state the true facts;
521 join in the prayer of the plaintiff and consent to the appointment of a receiver or receivers as the court may direct and James L. Quackenbush, Esq., General Counsel for the company, be and he is hereby authorized as Solicitor to file such answer and to take such action in the premises as to him shall seem appropriate."

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I, H. M. FISHER, Secretary of the Interborough Rapid Transit Company, hereby certify that the foregoing is a correct copy of resolution adopted to-day.

H. M. FISHER,
Secretary.

(Corporate Seal)

522

## Affidavit Showing Necessity of Individual Receivers.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

E 70-364.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JAMES L. QUACKENBUSH, being duly sworn, deposes and says: that he is a practicing attorney and a member of the Bar of the State of New York; that he is and has been the attorney and counsel for the defendant for the last twenty-five years and is thoroughly acquainted with the nature of its business.

That on account of the complexity of the questions which will arise from time to time in the course of the administration of the foregoing cause, he believes and he is informed that the parties hereto believe that it is important and in the public interest that no receiver in the cause should be a trust company or any other corporation, but that the receiver or receivers should be an individual or

individuals who could give constant and undivided attention to the matter; that the operation of the subways and elevated railroads could not be adequately managed by a trust company through its officers and employees; that while in bankruptcy the appointment of a trust company as receiver might be advisable such is not the case in respect to a railroad of the size, importance and character of the defendant with its complicated and involved daily operations, its enormous staff of operating officials and employees consisting of more than 18,000 individuals and its contracts and relations with the City of New York and the public using its facilities.

JAMES L. QUACKENBUSH.

Sworn to before me this
25th day of August, 1932.

ARTHUR G. PEACOCK,
Notary Public,
Queens County.
Certificate Filed in New York County No. 300.

(Seal)

Doc. 1
Order 1

**Designation and Assignment of Hon. Martin T. Manton to Hold a District Court for the Southern District of New York.**

WHEREAS, the undersigned as Senior Circuit Judge of the Second Judicial Circuit of the United States, is empowered and authorized by law, pursuant to the provisions of Title 28, Section 22 of the Code of Laws of the United States of America, if the public interest so requires, to designate and assign any Circuit Judge of the Second Judicial Circuit to hold a District Court within such Circuit; and

WHEREAS, the undersigned, as such Senior Circuit Judge, finds that the public interest requires that Martin T. Manton, a Circuit Judge of the Second Judicial Circuit, be designated and assigned as a Circuit Judge of this Judicial Circuit to hold a District Court within such Circuit, it is hereby

ORDERED, ADJUDGED AND DECREED, that the said Martin T. Manton be and he hereby is designated and assigned to hold a District Court of the United States for the Southern District of New York, Second Judicial Circuit, during the period beginning August 25, 1932, and particularly to hear and determine all applications and proceedings in the matter entitled American Brake Shoe and Foundry Co. vs. Interborough Rapid Transit Company, and for such further time as may be required to complete unfinished business.

Dated: New York, August 25, 1932.

MARTIN T. MANTON,
*Senior Circuit Judge for the*
*Second Judicial Circuit.*

(*Endorsed*)

U. S. District Court
Filed
August 26, 1932
S. D. of N. Y.

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Doc. 2
Order 2

**Order Under Section 23, Judicial Code, as to Division of Business of District Court.**

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND JUDICIAL CIRCUIT.

| | |
|---|---|
| In the Matter<br>of<br>the Division of Business and Assignment of Cases for Trial in the Southern District of New York. | ORDER |

WHEREAS, Martin T. Manton has been duly designated and assigned to hold a District Court of the United States for the Southern District of New York within this Second Judicial Circuit for a period of thirty days from this day; and

WHEREAS, Section 23 of the Judicial Code (Mar. 3, 1919, c. 231, §23, 36 Stat. 1090) provides that "In Districts having more than one District Judge, the judges may agree upon a division of business and assignment of cases

for trial in said District; but in case they do not so agree, the Senior Circuit Judge of the Circuit in which the District lies shall make all necessary orders for the division of business and the assignment of cases for trial in said District"; and

WHEREAS, Martin T. Manton, a Circuit Judge of the Second Judicial Circuit of the United States designated and assigned to hold a District Court in the Southern District of New York in said Circuit, and acting as District Judge for the Southern District of New York in this Second Judicial Circuit, does not agree upon the division of business and assignment of cases for trial in the Southern District of New York as provided in and pursuant to the rules of court for the Southern District of New York heretofore adopted by the then United States District Judges for the Southern District of New York; it is hereby

ORDERED, ADJUDGED AND DECREED, for a period of thirty days beginning with this day, all applications for the appointment of receivers in equity causes in the Southern District of New York may be made not only to the District Judge designated to hear such application pursuant to Rule 11-A of the General Rules of the District Court for the Southern District of New York, but also to Martin T. Manton, Circuit Judge designated to act as District Judge to hold a District Court for the Southern District of New York.

Dated: New York, August 25, 1932.

MARTIN T. MANTON.

(*Endorsed*)

U. S. District Court
Filed
August 26, 1932
S. D. of N. Y.

Doc. 6
Order 3

## Order Appointing Temporary Receivers.

IN THE

## DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

This cause came on to be heard at this term upon the bill of complaint and on the answer of the defendant thereto this day filed, and thereupon, upon consideration thereof, and after due deliberation, the Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED, that Victor J. Dowling of the City of New York and Thomas E. Murray, Jr., of the City of New York be and they hereby are appointed temporary Receivers of the defendant, Interborough Rapid Transit Company, and of all the property and assets of the said defendant, real, personal and mixed, of whatsoever kind and description and wheresoever situated, including all railroads owned, leased or operated by said defendant, all tracks, terminal facilities, offices, shops and all buildings and appurtenances of every kind, all cars and other rolling stock and equipment, tools, machinery,

furniture, fixtures, materials and supplies, books of account, records and other books, papers and accounts, cash in bank, on deposit and in hand, money, debts, things in action, credits, stocks, bonds, evidences of indebtedness, securities, deeds, leases, contracts, muniments of title, bills receivable, rents, issues, profits and income accruing and to accrue, as well as all interest, easements, privileges and franchises and all assets of every kind, character and description of the defendant herein; that the said Receivers be, and they hereby are, authorized immediately to take possession of the same and to run, manage and operate the said railroads, properties and assets in such manner as will in their judgment produce most satisfactory results so that the operation of the railroad system of the defendant shall be continued in the same manner as at present and the public duties obligatory upon the defendant be in all respects discharged, and to exercise the authority and franchises of defendant and discharge its public duties and to preserve and protect its said system, properties and assets in proper condition and repair and to protect the title and possession and secure and develop the business of the same, and in their discretion to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees, and to make such payments and disbursements as may be needful and proper in so doing; that the said Receivers be, and they hereby are, authorized to collect and receive the rents, income, tolls and profits of the said railroads, properties and assets, and to make appropriate payments therefrom on account of accruing rents and other necessary charges, and they shall have power to redeem any and all securities of the defendant now pledged as security on loans of money, and shall have power to borrow money if needful in their judgment in order to comply with this direction, and also, so far as may be needful to meet current requirements for labor, materials and supplies, but

for no other purpose without the further order of this Court; and the said Receivers are hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in their judgment for the proper protection of the property and trust hereby reposed in them and likewise to defend all actions instituted against them as Receivers, and also to appear in and conduct the prosecution or defense of any suits now pending in any court against the defendant, the prosecution and defense of which will in the judgment of said Receivers be necessary for the proper protection of the property placed in their charge, or the interests and rights of creditors connected therewith; and the said Receivers are hereby authorized in their discretion from time to time, out of the funds coming into their hands, to pay the expenses of operating the said properties and executing their trusts, and all taxes and assessments upon the said properties or any part thereof, and all such rentals and installments as may fall or become due for the use of any portion of said railroads and other property; and also to pay and discharge all claims arising from the previous operation of said properties as in their judgment on examination are proper to be paid as expenses of operation, and also to pay the current and unpaid payrolls (especially any and all outstanding checks, drafts or orders for the payment of wages or salaries of employees of defendant for work done or services rendered prior to the date of this order), and vouchers and supply accounts incurred in the operation of said railroad system at any time within four months prior hereto. The said Receivers are hereby required to open proper books of account, wherein shall be stated the earnings, expenses, receipts and disbursements of their said trust, and preserve proper vouchers for all payments by them made on account thereof;

AND IT IS FURTHER ORDERED, that the bonds of the said Receivers in the sum of One hundred thousand dollars

each, conditioned that they will well and truly perform the duties of their office and duly account for all moneys or property which may come into their hands, and abide by and perform all things which they shall be directed to do, with sufficient sureties to be approved of by a judge of this Court, be filed in the office of the Clerk of this Court;

AND IT IS FURTHER ORDERED that the defendant, said Interborough Rapid Transit Company, and each and every of its officers, directors, agents and employees and all other persons whomsoever, be and they are hereby required and commanded forthwith, upon demand of the said Receivers, or their duly authorized agent, to turn over and deliver to said Receivers, or their duly constituted representatives, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys or other property in his or their hands or under his or their control, and each of said directors, officers, agents and employees is hereby commanded and required to obey and perform such orders as may be given to them from time to time by the said Receivers, or their duly constituted representatives, in conducting the operation of the said system, properties and assets, and in discharging their duties as Receivers;

And the defendant, said Interborough Rapid Transit Company, and its officers, directors, agents and employees, and all other persons claiming to act by, through or under the defendant and all other persons whomsoever are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the Receivers are hereby appointed or interfering in any way to prevent the discharge of their duties or their operation of the same, and any party in interest may apply for further direction;

And it is further ordered that any applications or petitions for orders or instructions or otherwise in this cause shall be made to the undersigned in chambers or

otherwise, the undersigned hereby reserving full right and jurisdiction over this cause and any and all proceedings therein;

And it is further ordered that if either of said Receivers shall qualify by giving his bond before the other of such Receivers has so qualified, the said Receiver so first qualifying shall, until the other of such Receivers has so qualified, exercise any or all the powers, by this order or subsequent orders entered herein, conferred upon said Receivers;

And it is further ordered that if at any time either of said Receivers shall, because of absence from the United States or otherwise, be unable to act, the other of such Receivers may in such event exercise any or all the powers, by this order or subsequent orders entered herein, conferred upon said Receivers;

And it is further ordered that the parties hereto show cause before the undersigned at Room 439 at the United States Post Office Building in the City of New York on the 22nd day of September, 1932, at 10.30 o'clock in the forenoon, why the said receivership should not be continued during the pendency of this suit and upon the hearing thereon any other creditor of the defendant or other party in interest may be heard.

Dated, New York, August 26, 1932.

MARTIN T. MANTON,
*United States Circuit Judge designated to hold a session of the District Court for the Southern District of New York.*

(*Endorsed*)

U. S. District Court
Filed
August 26, 1932
S. D. of N. Y.

Doc. 7.
Order 4.

## Order Appointing Receivers' Counsel.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364. |

This cause coming on to be heard upon the petition of Thomas E. Murray, Jr., Receiver herein, acting for and on behalf of both Receivers appointed herein, for leave to employ solicitors and general counsel for said Receivers, and upon the annexed affidavit of Thomas L. Chadbourne, and it appearing to the Court from such petition that numerous and intricate legal questions will be presented in the administration of said receivership, and that it is necessary for said Receivers to employ solicitors and general counsel to aid them in said administration, and it appearing from such petition and the affidavit of Thomas L. Chadbourne that Chadbourne, Stanchfield & Levy, practicing attorneys and members of the Bar of the State of New York, 25 Broadway, Borough of Manhattan, City of New York, are competent to act as solicitors and general counsel for said Receivers and for the special reasons set forth in such petition and affidavit are not disqualified, because of any adverse interest, it is therefore

556 *American Brake Shoe Record.*
*Order Appointing Receivers' Counsel.*

ORDERED that leave be, and it is hereby, granted to said Receivers to retain said Chadbourne, Stanchfield & Levy as solicitors and general counsel for the Receivers in the above-entitled cause; and it is further

ORDERED that said Chadbourne, Stanchfield & Levy be, and they are hereby, appointed the solicitors and general counsel for said Receivers.

Dated, New York, N. Y., August 26, 1932.

MANTON,
557 *U. S. Circuit Judge designated to hold a term of the District Court for Southern District of New York.*

558

Doc. 28
Order 15

## Order Appointing Tort Creditors' Committee.

DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE & FOUNDRY CO., Plaintiff, against INTERBOROUGH RAPID TRANSIT CO., Defendant. | In Equity E 70-364 |

An order having been made in this action on August 26th, 1932, by Hon. Martin T. Manton, United States District Judge, designated to hold a session of the District Court of the United States, in and for the Southern District of New York, appointing Hon. Victor J. Dowling and Thomas E. Murray, Jr., as Receivers in Equity of the assets of the defendant herein; and it appearing to my satisfaction that it is to the best interests of the tort creditors of the defendant herein that a Committee be appointed for the purpose of protecting the interests of the tort creditors of the defendant corporation, and after due notice being given to the attorneys for the defendant herein, it is, on motion of Feltenstein & Rosenstein, attorneys for certain tort creditors,

ORDERED that the following persons be and they are hereby appointed a Protective Committee to protect and look after the interests of tort creditors of the defendant corporation, viz.:

562 *American Brake Shoe Record.*
*Order Appointing Tort Creditors' Committee.*

William S. Butler,
Moses Feltenstein,
Lyman A. Spalding and
Herbert C. Smyth;

and it is further

ORDERED that Mr. Moses Feltenstein be and he is hereby appointed Chairman of the aforesaid Committee, and that said Committee do appoint and select a suitable person as Secretary of such Committee; and it is further

563 ORDERED that the said Committee report to the Court from time to time as may be found necessary or as may be demanded by this Court at any such times.

MANTON, *U. S. J.*,
*Designated to hold a term of the District Court for the Southern District of New York.*

564

Doc. 10
Order 5

## Order Granting Leave to Intervene to Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

This cause came on to be further heard at this Term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

1. That the said J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, be and they hereby are permitted to intervene as such Committee in this action as a party defendant and to appear for and represent all owners and holders of Interborough Rapid Transit Company First and Refund-

ing Mortgage 5% Gold Bonds who may deposit such Bonds with the said Committee, and

2. All notices of further motions or proceedings in the above entitled cause shall be served upon Messrs. Davis, Polk, Wardwell, Gardiner & Reed, 15 Broad Street, New York City, counsel for said Committee, pursuant to the rules and practice of this Court.

Dated, New York, September 1st, 1932.

MANTON,
*United States Circuit Judge designated*
569 *to hold a session of the District Court*
*for the Southern District of New York.*

---

The undersigned hereby consent to the granting of the prayer of the within petition and the entry of an order granting leave to the petitioners to intervene.

Dated, New York, N. Y., September 1, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff,
by BREED, ABBOTT & MORGAN,
Its Solicitors.

INTERBOROUGH RAPID TRANSIT COMPANY,
570 Defendant,
by JAMES L. QUACKENBUSH,
Its Solicitor.

VICTOR J. DOWLING and
THOMAS E. MURRAY, JR.,
as Temporary Receivers of Interborough Rapid Transit Company,
by CHADBOURNE, STANCHFIELD & LEVY,
Their Solicitors.

Doc. 11
Order 6

## Order Granting Leave to Intervene to the Committee Constituted by and Acting under the Deposit Agreement Dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

This cause came on to be further heard at this Term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

1. That the said J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, be and they hereby are permitted to intervene as such Committee in this action as a party defendant and to appear for and represent all owners and holders of Interborough Rapid Transit Company Ten-Year

Secured Convertible 7% Gold Notes who have deposited or may deposit such notes under the said Deposit Agreement, and

2. All notices of further motions or proceedings in the above-entitled cause shall be served upon Messrs. Davis, Polk, Wardwell, Gardiner and Reed, 15 Broad Street, New York City, counsel for said Committee, pursuant to the rules and practice of this Court.

Dated, New York, September 1st, 1932.

MANTON,
*United States Circuit Judge designated to hold a session of the District Court for the Southern District of New York.*

---

The undersigned hereby consent to the granting of the prayer of the within petition and the entry of an order granting leave to the petitioners to intervene.

Dated, New York, N. Y., September 1, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff,
by BREED, ABBOTT & MORGAN,
Its Solicitors.

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant,
by JAMES L. QUACKENBUSH,
Its Solicitor.

VICTOR J. DOWLING and
THOMAS E. MURRAY, JR.,
as Temporary Receivers of Interborough Rapid Transit Company,
by CHADBOURNE, STANCHFIELD & LEVY,
Their Solicitors.

Doc. 12
Order 7

**Order for Intervention of Committee for the Protection of the Holders of Ten-Year 6% Gold Notes of Interborough Rapid Transit Company Under Deposit Agreement Dated as of July 18, 1932.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK. 578

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

Upon reading and filing the annexed petition of Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, constituting a Committee for the Protection of the Holders of Ten-Year Six Per Cent. 579
Gold Notes due October 1, 1932, of the above-named defendant, and after hearing Root, Clark & Buckner, solicitors for said petitioners, and upon the subjoined consent of Chadbourne, Stanchfield & Levy, solicitors for Victor J. Dowling and Thomas E. Murray, Jr., temporary receivers of said defendant, and Breed, Abbott & Morgan, solicitors for the plaintiff, and James L. Quackenbush, solicitor for defendant, and Davis, Polk, Wardwell, Gardiner & Reed, solicitors for the Committee for Interborough Rapid

580 *American Brake Shoe Record.*
*Order Permitting Interrention.*

Transit Company Ten-Year Secured Convertible 7% Gold Notes due September 1, 1932, and for the Committee for Interborough Rapid Transit Company First & Refunding Mortgage 5% Gold Bonds due January 1, 1966, it is

ORDERED, that the prayer of said petitioners be, and the same hereby is, granted; and that the said Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, as a Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of this defendant, be and they hereby are
581 permitted to intervene as parties in this suit, and in any suit or proceeding presently pending or hereafter to be instituted ancillary thereto, and such intervention be, and the same hereby is, authorized and directed; and it is further

ORDERED, that all notices of further motions or proceedings in this Court and all further motions and proceedings in this suit, or in any suit or proceeding ancillary thereto, during the pendency thereof, which are required to be brought on by notice, shall be served upon the solicitors for said interveners, Root, Clark & Buckner, at their office, No. 31 Nassau Street, in the Borough of Manhattan, City of New York, pursuant to the rules and practice of this Court.

582 MANTON,
*United States Circuit Judge designated to hold a session of the District Court for the Southern District of New York.*

Dated, New York City, September , 1932.

*American Brake Shoe Record.*
*Consent to Permitting Intervention.*

The undersigned consent to the entry of the foregoing order.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Victor J. Dowling and Thomas E. Murray, Jr., temporary Receivers of the above-named defendant.

BREED, ABBOTT & MORGAN,
Solicitors for the Plaintiff.

JAMES L. QUACKENBUSH,
Solicitor for Defendant.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for the Committee for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes due September 1, 1932, and for the Committee for Interborough Rapid Transit Company First & Refunding Mortgage 5% Gold Bonds due January 1, 1966.

Doc. 14
Order 8

## Order Dated September 6, 1932, Appointing Temporary Receiver for Manhattan Railway Company.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

587 THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

In Equity
E 70-364

IN THE MATTER
OF
The Petition of MANHATTAN RAILWAY COMPANY.

588 This cause came on to be heard at this term upon the petition of Manhattan Railway Company this day filed, to be made a party defendant in this suit and for other relief, and thereupon, upon consideration thereof, and after hearing Dills, Muecke & Schelker, solicitors for said petitioners, Breed, Abbott & Morgan for plaintiff, James L. Quackenbush for defendant, Chadbourne, Stanchfield & Levy for the Receivers herein, Davies, Auerbach & Cornell for Central Hanover Bank and Trust Company, Trustee under the Consolidated Mortgage of Manhattan Railway Chase National Bank of the City of New York, Trustee Company, and Milbank, Tweed, Hope & Webb for the

under the Second Mortgage of Manhattan Railway Company, Davis, Polk, Wardwell, Gardiner & Reed for Messrs. J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell as a Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds and as a Committee for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, and Root, Clark & Buckner for Messrs. Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood as a Committee for Interborough Rapid Transit Company Ten-Year Six Per Cent. Gold Notes, and after due deliberation, the Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED that the petitioner, Manhattan Railway Company, be and it is hereby made a party defendant in this cause;

AND IT IS FURTHER ORDERED, that the receivership in this cause be and the same is hereby extended to said petitioner, Manhattan Railway Company, and its property and assets, real, personal and mixed, of whatsoever kind and description and wheresoever situated, as prayed in said petition;

AND IT IS FURTHER ORDERED, that William Roberts, of the City of New York, be and he is hereby appointed temporary Receiver of the defendant Manhattan Railway Company and its property and assets, real, personal and mixed, of whatsoever kind and description and wheresoever situated, and, as such temporary Receiver, shall have and exercise in respect of said properties and assets of Manhattan Railway Company (subject to all the rights of the defendant Interborough Rapid Transit Company and its Receivers under all leases and agreements between Inter-

borough Rapid Transit Company and Manhattan Railway Company), the like rights, powers and duties with respect thereto that Victor J. Dowling and Thomas E. Murray, Jr., were heretofore given by order of this Court dated August 26, 1932, with respect to the Interborough Rapid Transit Company and the properties and assets of Interborough Rapid Transit Company; but nothing in this order contained shall be deemed in any way to prejudice, affect, impair, diminish, enlarge or augment the rights of Manhattan Railway Company or its said Receiver against Interborough Rapid Transit Company or its said Re-
593 ceivers, or in any way to prejudice, affect, impair, diminish, enlarge or augment the rights of Interborough Rapid Transit Company or its said Receivers against Manhattan Railway Company or its said Receiver, or to constitute an affirmance or disaffirmance of, or affect the right, if any, to affirm or disaffirm, any lease, leases, agreement or agreements between Manhattan Railway Company and Interborough Rapid Transit Company, or to put the said Receiver of Manhattan Railway Company into physical possession of any properties now properly in the possession of the said Receivers of Interborough Rapid Transit Company under the order appointing them; all rights of said Receivers for Interborough Rapid Transit Company and of said Receiver for Manhattan Railway Company, each
594 against the other, being fully reserved and being entirely maintained, without prejudice, in *statu quo ante* and completely undisturbed by the entry of this order;

AND IT IS FURTHER ORDERED, that the bond of the said Receiver of the defendant Manhattan Railway Company in the sum of One hundred thousand dollars, conditioned that he will well and truly perform the duties of his office and duly account for all moneys or property which may come into his hands, and abide by and perform all things which he shall be directed to do, with sufficient sureties to be approved of by a judge of this Court, be filed in the office of the Clerk of this Court;

*American Brake Shoe Record.*
*Order Appointing Temporary Receiver for Manhattan Railway Company.*

AND IT IS FURTHER ORDERED, that the defendant, said Manhattan Railway Company, and each and every of its officers, directors, agents and employees and all other persons whomsoever, be and they are hereby required and commanded forthwith, upon demand of the said Receiver, or his duly authorized agent, to turn over and deliver to said Receiver, or his duly constituted representatives, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys or other property in his or their hands or under his or their control, and each of said directors, officers, agents and employees is hereby commanded and required to obey and perform such orders as may be given to them from time to time by the said Receiver, or his duly constituted representatives, in conducting the operation of the said properties and assets, and in discharging his duties as Receiver;

And the defendant, said Manhattan Railway Company, and its officers, directors, agents and employees, and all other persons claiming to act by, through or under the defendant and all other persons whomsoever, are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the Receiver is hereby appointed or interfering in any way to prevent the discharge of his duties or his operation of the same, and any party in interest may apply for further direction;

And the said temporary Receivers of Interborough Rapid Transit Company are hereby directed to keep separate accounts with respect to the properties of Manhattan Railway Company so that the rents, issues and profits from such properties may be segregated;

AND IT IS FURTHER ORDERED, that the parties hereto show cause before the undersigned at Room 439 at the United

598 *American Brake Shoe Record.*
*Order Appointing Temporary Receiver for Manhattan Railway Company.*

States Post Office Building in the City of New York on the 22nd day of September, 1932, at 10.30 o'clock in the forenoon, why the extension of said receivership to said Manhattan Railway Company and its said property and assets should not be continued during the pendency of this suit and upon the hearing thereon any other creditor of the defendant or other party in interest may be heard.

Dated, September 6th, 1932.

MARTIN T. MANTON,
599 *United States Circuit Judge designated to hold a session of the District Court for the Southern District of New York*

600

Doc. 20
Order 9

## Order Granting Leave to Intervene to Committee for Manhattan Railway Company Consolidated Mortgage Gold Four Per Cent. Bonds.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

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|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

This cause came on to be further heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED AND DECREED as follows:

(1) That the said Van Santvoord Merle-Smith, Walter Bennett, Philip A. Benson, Fred J. Fuller and James Lee Loomis, as the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, be and they hereby are permitted to intervene as such Protective Committee in this action as a party defendant and to appear for and represent all owners and holders of Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, who may deposit such Bonds with said Protective Committee; and

604 *American Brake Shoe Record.*
*Order Permitting Manhattan Ry. Co. Bondholders' Committee to Intervene.*

(2) That all notices of further motions or proceedings in the above-entitled cause shall be served upon Messrs. Cotton, Franklin, Wright & Gordon, No. 63 Wall Street, New York City, counsel for said Protective Committee, pursuant to the rules and practice of this Court.

Dated, New York, N. Y., September 6th, 1932.

(sgd.) MANTON,
*United States District Judge designated to hold session of the District Court*
605 *for the Southern District of New York.*

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The undersigned hereby consent to the granting of the prayer of the within petition and the entry of an order granting leave to the petitioners to intervene.

Dated, New York, N. Y., September 7, 1932.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Victor J. Dowling and Thomas E. Murray, Jr., Temporary Receivers of Interborough Rapid Transit Company.

606

BREED, ABBOTT & MORGAN,
Solicitors for Plaintiff, American Brake Shoe and Foundry Company.

JAMES L. QUACKENBUSH,
Solicitor for Defendant, Interborough Rapid Transit Co.

Doc. 26
Order 14

## Order Appointing Counsel for Receiver of Manhattan Railway Company.

At a Stated Term of the United States District Court for the Southern District of New York, held in and for the said District, at the Old Post Office Building, in the Borough of Manhattan, City, County and State of New York, on the 7th day of September, 1932.

Present:
Hon. MARTIN T. MANTON,
*Circuit Judge.*

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |
| IN THE MATTER OF THE PETITION OF MANHATTAN RAILWAY COMPANY. | |

This cause having come on to be heard upon the petition of William Roberts, Receiver of Manhattan Railway Company herein, for leave to employ counsel for said Receiver, and it appearing to the Court that there are numerous legal questions presented in the administration of said receivership, and that it is necessary for said Receiver

to employ counsel to aid him in said administration, and that Messrs. Hughes, Schurman & Dwight, of 100 Broadway, Borough of Manhattan, City of New York, are familiar with the matters appertaining to said receivership, and are competent to act as attorneys for said Receiver, it is therefore

ORDERED that leave be and it hereby is granted to said William Roberts, as Receiver of Manhattan Railway Company, to retain and employ Messrs. Hughes, Schurman & Dwight as attorneys for the Receiver of Manhattan Railway Company in the above entitled cause. And it is

FURTHER ORDERED that Messrs. Hughes, Schurman & Dwight be and they hereby are appointed attorneys for said William Roberts, Receiver of Manhattan Railway Company in the above entitled cause.

Enter,

MARTIN T. MANTON,
*United States Circuit Judge designated to hold a term of the District Court of the Southern District of New York.*

Doc. 29
Order 16

## Amendment of Order Appointing Tort Creditors' Committee to Include Tort Claimants.

DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

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|---|---|
| THE AMERICAN BRAKE SHOE & FOUNDRY CO., Plaintiff, against INTERBOROUGH RAPID TRANSIT CO., Defendant. | In Equity E 70-364 |

An order having been made in the above entitled action appointing William S. Butler, Moses Feltenstein, Lyman A. Spalding and Herbert C. Smyth as a Protective Committee to protect and look after the interests of tort creditors of the defendant corporation, such order having been made on or about the 29th day of August, 1932, by Hon. Martin T. Manton, United States Judge, designated to hold a term of the District Court for the Southern District of New York, it is, on motion of Feltenstein & Rosenstein, attorneys for certain tort creditors and claimants,

ORDERED that the aforementioned order be and the same is hereby amended nunc pro tunc as of August 29th, 1932, to read as follows:

616 *American Brake Shoe Record.*
*Amendment of Order Appointing Tort Creditors' Committee.*

## DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE & FOUNDRY CO., Plaintiff, against INTERBOROUGH RAPID TRANSIT CO., Defendant | In Equity E 70-364 |

617

An order having been made in this action on August 26th, 1932, by Hon. Martin T. Manton, United States District Judge, designated to hold a session of the District Court of the United States, in and for the Southern District of New York, appointing Hon. Victor J. Dowling and Thomas E. Murray, Jr., as Receivers in Equity of the assets of the defendant herein; and it appearing to my satisfaction that it is to the best interests of the tort creditors and tort claimants of the defendant herein that a Committee be appointed for the purpose of protecting the interests of the tort creditors and tort claimants of the defendant corporation, and after due notice being given
618 to the attorneys for the defendant herein, it is, on motion of Feltenstein & Rosenstein, attorneys for certain tort creditors and tort claimants,

ORDERED that the following persons be and they are hereby appointed a Protective Committee to protect and look after the interests of tort creditors and tort claimants of the defendant corporation, viz.:

William S. Butler,
Moses Feltenstein,
Lyman A. Spalding and
Herbert C. Smyth;

and it is further

ORDERED that Mr. Moses Feltenstein be and he is hereby appointed Chairman of the aforesaid Committee, and that said Committee do appoint and select a suitable person as Secretary of such Committee; and it is further

ORDERED that the said Committee report to the Court from time to time as may be found necessary or as may be demanded by this Court at any such times.

MANTON,
*U. S. C. J.*

Sept. 9/32

Doc. 22
Order 10

## Order Authorizing Receivers to Number Documents and Papers.

IN THE

UNITED STATES DISTRICT COURT

623 FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

This cause coming on to be heard upon the petition of Victor J. Dowling and Thomas E. Murray, Jr., the Receivers herein of Interborough Rapid Transit Company,
621 and upon the consent thereto of the attorneys for the complainant, the attorney for the defendant, the attorneys for the Committee constituted by and acting under the deposit agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes, the attorneys for the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, the attorneys for the Committee for the protection of the holders of Ten-Year

6% Gold Notes due October 1, 1932, of Interborough Rapid Transit Company, the attorneys for the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, and the attorneys for the Receiver of Manhattan Railway Company, and upon consideration thereof, and after due deliberation, the Court being fully advised in the premises, it is

ORDERED, ADJUDGED AND DECREED that the Receivers be and they hereby are authorized and permitted to cause all of the documents and papers to be filed in the proceedings in this cause to be numbered, and that any parties in these proceedings may refer by such number to any of such documents and papers in any subsequent proceedings in this cause.

Dated, New York, N. Y., September 12th, 1932.

MANTON,
*U. S. Circuit Judge designated to hold a term of the District Court for the Southern District of New York.*

Doc. 23
Order 11

## Order Authorizing Receivers to Maintain a Printed Record of All Documents.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

This cause coming on to be heard upon the petition of Victor J. Dowling and Thomas E. Murray, Jr., the Receivers herein of Interborough Rapid Transit Company, and upon the consent thereto of the attorneys for the complainant, the attorney for the defendant, the attorneys for the Committee constituted by and acting under the deposit agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes, the attorneys for the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, the attorneys for the Committee for the protection of the holders of Ten-Year 6% Gold Notes due October 1, 1932, of Interborough Rapid Transit Company, the attorneys for the Protective Committee for Manhattan Railway Company Consolidated

Mortgage Gold 4% Bonds and the attorneys for the Receiver of Manhattan Railway Company, and upon consideration thereof, and after due deliberation, the Court being fully advised in the premises, and it appearing to the Court that the entry of this order will facilitate and further the orderly and careful administration of the estate, it is therefore

ORDERED, ADJUDGED AND DECREED that leave be and it is hereby granted to said Receivers to maintain a printed record of all documents arising in the proceedings in this cause and of any further documents and papers which in the discretion of the Receivers should be so printed.

Dated, New York, N. Y., September 12th, 1932.

MANTON,
*U. S. Circuit Judge designated to hold a term of the District Court for the Southern District of New York.*

Doc. 24
Order 12

## Order Authorizing Receivers to Pay Expenses for Registration and Transfer of Stock of Interborough Rapid Transit Company.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

629

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|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

This cause coming on to be heard upon the petition of Victor J. Dowling and Thomas E. Murray, Jr., the Receivers herein of Interborough Rapid Transit Company, and upon the consent thereto of the attorneys for the
630 complainant, the attorney for the defendant, the attorneys for the Committee constituted by and acting under the deposit agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes, the attorneys for the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, the attorneys for the Committee for the protection of the holders of Ten-Year 6% Gold Notes due October 1, 1932, of Interborough Rapid Transit Company, the attorneys for the Protective

Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds and the attorneys for the Receiver of Manhattan Railway Company, and upon consideration thereof, and after due deliberation, the Court being fully advised in the premises, and it appearing to the Court that the entry of this order will facilitate and further the orderly and careful administration of the estate, it is therefore

ORDERED, ADJUDGED AND DECREED that, until the Court shall otherwise direct, the Receivers be and they hereby are authorized to pay, out of funds coming into their hands as Receivers, such expenses as they shall deem necessary or proper for the registration and transfer of the outstanding shares of stock of Interborough Rapid Transit Company.

Dated, New York, N. Y., September 12th, 1932.

MANTON,
*U. S. Circuit Judge designated to hold a term of the District Court for the Southern District of New York.*

Doc. 25
Order 13

## Order Deferring Payment of State Franchise Tax.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

635

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

In Equity
E 70-364

This cause coming on to be heard on the petition of Victor J. Dowling and Thomas E. Murray, Jr., Receivers herein for Interborough Rapid Transit Company, praying
636 for an order with respect to the non-payment of the franchise tax for said Company, and upon the consents of the solicitors for the Complainant, the solicitor for the Defendant, the solicitors for the Committee constituted and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes, the solicitors for the Committee for Interborough Rapid Transit Company's First and Refunding Mortgage 5% Gold Bonds, and the solicitors for the Committee for the protection of the

holders of Ten-Year 6% Gold Notes, due October 1, 1932, of Interborough Rapid Transit Company, and after hearing the arguments of the solicitors for the said Receivers, and the solicitors for the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, and the solicitors for the Receiver of Manhattan Railway Company, and upon consideration thereof, and after due deliberation, the Court being fully advised in the premises, it is therefore

ORDERED, ADJUDGED AND DECREED that said Receivers be and they hereby are authorized and directed not to pay the franchise tax referred to in the said petition of said Receivers until such time as this Court shall otherwise direct.

Dated, New York, N. Y., September 14, 1932.

MANTON,
*United States Circuit Judge designated to hold a term of the District Court for the Southern District of New York.*

Doc. 30
Order 18

## Order Granting Leave to Central Hanover Bank and Trust Company to Intervene.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity No. 70-364 |

ORDER GRANTING PETITION OF CENTRAL HANOVER BANK AND TRUST COMPANY, AS TRUSTEE UNDER CONSOLIDATED MORTGAGE OF MANHATTAN RAILWAY COMPANY, FOR LEAVE TO INTERVENE AND BE MADE A PARTY.

This cause came on to be further heard at this term upon the petition of Central Hanover Bank and Trust Company, as Trustee, this day filed, for permission to intervene herein and to be made a party hereto, and was argued by counsel; and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED AND DECREED that the petitioner, Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Com-

pany, be and it hereby is permitted to intervene herein and it is hereby made a party in this cause.

Dated, September 19th, 1932.

MANTON,
*United States Circuit Judge designated to hold a session of the District Court for the Southern District of New York.*

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Doc. 30a

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity No. 70-364 |

Upon the petition filed herewith of Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Company, for leave to intervene and be made a party herein,

LET the plaintiff, the defendant Interborough Rapid Transit Company, the defendant Manhattan Railway

616 Company, the Receivers heretofore appointed herein of the property of Interborough Rapid Transit Company and the Receiver heretofore appointed herein of the property of Manhattan Railway Company, show cause before this Court at Room 439 of the Old Post Office Building, Broadway and Park Row, New York City, on the 19th day of September, 1932, at 2 P. M. o'clock or as soon thereafter as counsel may be heard, why an order should not be made and entered granting to said petitioner leave to intervene and be made a party herein; and it is further

617 ORDERED that service of a copy of this order and of the petition annexed hereto upon said parties or their attorneys on or before the 17th day of September, 1932, at 1 o'clock in the afternoon of that day, shall be deemed a good and sufficient service.

Dated, New York, September 16th, 1932.

MANTON,
*United States Circuit Judge designated to hold a session of the District Court for the Southern District of New York.*

618

Doc. 35
Order 17

## Order Authorizing Receivers to Employ Court Reporters.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK. 650

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

This cause coming on to be heard upon the petition of Victor J. Dowling and Thomas E. Murray, Jr., the Receivers herein of Interborough Rapid Transit Company, 651
and upon the consent thereto of the attorneys for the complainant, the attorney for the defendant, the attorneys for the Committee constituted by and acting under the deposit agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes, the attorneys for the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, the attorneys for the Committee for the protection of the holders of Ten-Year

652 *American Brake Shoe Record.*
*Order to Employ Court Reporters.*

6% Gold Notes due October 1, 1932, of Interborough Rapid Transit Company, the attorneys for the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, and the attorneys for the Receiver of Manhattan Railway Company and upon consideration thereof, and after due deliberation, the Court being fully advised in the premises, it is

ORDERED, ADJUDGED AND DECREED that the Receivers be and they are hereby authorized and directed to employ Southern District Court Reporters, 15 Park Row, New York City, N. Y., as court reporters to report testimony
653 and arguments before this Court in these proceedings.

Dated, New York, N. Y., September 26, 1932.

MANTON,
*U. S. Circuit Judge designated to hold a term of the District Court for the Southern District of New York.*

654

Doc. 49
Order 23

**Order Granting Leave to Central Hanover Bank and Trust Company, as Trustee, to Make Receivers Parties Defendant to Bill of Complaint.**

IN THE

UNITED STATES DISTRICT COURT

650

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

This cause came on to be further heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was 657

ORDERED, ADJUDGED AND DECREED, that leave be and the same hereby is granted to Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of the Manhattan Railway Company, to make Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of the property of Interborough Rapid Transit Company, and

658 *American Brake Shoe Record.*
*Order to Make Receivers Parties Defendant.*

William Roberts, as Receiver of the property of Manhattan Railway Company, parties defendant to any bill of complaint which it may file in this Court for the protection and/or enforcement of any rights of said Trustee and the holders of the bonds and coupons secured by said Consolidated Mortgage with respect to any property in the possession of said Receivers or any of them.

Dated, September 27, 1932.

MANTON,
*United States Circuit Judge designated*
659 *to hold a session of the District Court*
*for the Southern District of New York.*

660

Doc. 48
Order 22

## Order Granting Leave to Intervene to Harold Palmer and Others as Protective Committee for 7% Stock of Manhattan Railway Company.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 ORDER |

This cause coming on to be heard upon the petition for intervention by Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, as the Protective Committee for holders of Seven Per Cent. Guaranteed Stock of Manhattan Railway Company, and upon motion pursuant thereto, and the Court being duly advised, it is

ORDERED that said Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, as the Protective Committee for Manhattan Railway Company Seven Per Cent. Guaranteed Stock, be and they hereby are permitted to intervene as such Protective Committee in this cause as a party defendant, and to appear for and represent owners and holders of such stock who may make deposits with said Committee; and that

664 *American Brake Shoe Record.*
*Order for Palmer & Ors. to Intervene.*

notices of further proceedings in this cause shall be served upon Messrs. Marshall & Wehle, No. 50 Broadway, New York City, solicitors for said Committee.

Dated, New York, N. Y., September 28, 1932.

(Signed) MANTON,
*U. S. C. J.*

(*Endorsement on Cover*)

U. S. District Court
Filed
665 Sept. 29, 1932
S. D. of N. Y.

666

Doc. 46
Order 21

## Order Continuing Receivership.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

This cause came on to be heard at this term and thereupon, upon consideration thereof,

IT WAS ORDERED, ADJUDGED AND DECREED as follows:

1. The receivership of the defendant Interborough Rapid Transit Company and of all its property and assets, and the extension of such receivership to defendant Manhattan Railway Company and of all its property and assets, are hereby continued during the pendency of this cause; Victor J. Dowling and Thomas E. Murray, Jr., are hereby continued as Receivers of the defendant Interborough Rapid Transit Company and of all its property and assets during the pendency of this cause, with all the powers heretofore granted said Receivers by the order of this Court entered herein August 26, 1932, appointing them Receivers of Interborough Rapid Transit Company

670 *American Brake Shoe Record.*
*Order Continuing Receivership.*

and by any other orders heretofore entered herein; and William Roberts is hereby continued as Receiver of the defendant Manhattan Railway Company and of all its property and assets during the pendency of this cause, with all the powers heretofore granted said Receiver by the order of this Court entered herein September 6, 1932, appointing him Receiver of Manhattan Railway Company and by any other orders heretofore entered herein.

2. All other terms and provisions of said order entered herein August 26, 1932, and of said order of September 6, 1932, and all other orders entered herein are continued
671 during the pendency of this cause, until the further order of this Court.

3. The bonds of the said Receivers, Victor J. Dowling and Thomas E. Murray, Jr., in the sum of $100,000 each heretofore given by each of said Receivers in accordance with said order of this Court entered herein August 26, 1932, shall stand, and said bonds are hereby approved and shall be and be deemed to be the bonds of such Receivers acting pursuant to this order, and said Receivers are hereby authorized to pay the premiums on said bonds out of the receivership estate of Interborough Rapid Transit Company.

672 4. The bond of the said Receiver, William Roberts, in the sum of $100,000 heretofore given by said Receiver in accordance with said order of this Court entered herein September 6, 1932, shall stand, and said bond is hereby approved and shall be and be deemed to be the bond of said Receiver acting pursuant to this order, and said Receiver is hereby authorized to pay the premium on said bond out of the receivership estate of Manhattan Railway Company.

5. Any application or petition for orders or instructions or otherwise in this cause shall be made to the

undersigned in chambers or otherwise, the undersigned hereby reserving full right and jurisdiction over this cause and any and all proceedings therein.

6. The September, 1932, equity term of this Court is extended until after the complete execution and carrying out of this order and decree, and until after the final determination and disposition of all matters herein reserved for future determination or action by this Court. Said equity term is extended, in any event, for a period of three years from the date of this order or decree, with leave to any party to the above-entitled cause at any time prior to the expiration of said period of three years to apply to this Court for a further extension of said term, this Court reserving full jurisdiction over the parties to the above-entitled cause and over the property and assets of the defendant Interborough Rapid Transit Company and of the defendant Manhattan Elevated Railway Company, and reserves for later adjudication or other action any and all matters which in due course may come before this Court for determination, and for that purpose the term of the Court is hereby extended.

Dated, New York, September 28th, 1932.

MARTIN T. MANTON,
*United States Circuit Judge designated to hold a session of the District Court for the Southern District of New York.*

(*Endorsed*)

U. S. District Court
Filed
Sept. 29, 1932
S. D. of N. Y.

Doc. 34a
Order 19

**Order Making Guaranty Trust Company of New York, Trustee, a Party and Directing Hearing on Receivers' Application as to Payments Under Manhattan Lease.**

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

677 THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff,

against

INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.

In Equity
E 70-364

On reading and filing the petition of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of Interborough Rapid Transit Company, filed this day, praying for instructions of this Court in respect to the railroads of Manhattan Railway Company and other matters therein set forth, it is

678 ORDERED, that Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company dated March 20, 1913, be and is hereby made a party to this cause; and it is

FURTHER ORDERED, that a copy of said petition and this order be served upon all the parties to this cause, including Guaranty Trust Company of New York as Trustee as aforesaid and the Receiver of Manhattan Railway Com-

pany, and that said service be made on or before the 29th day of September, 1932, and that all of said parties be and they are hereby directed to serve and file their respective answers to said petition on or before the 1st day of October, 1932, and that said petition be and is hereby set down for hearing on the 3rd day of October, 1932, at 3 o'clock P. M., in Room 439, United States Post Office Building, Borough of Manhattan, City of New York, or at such other time as the Court may hereafter fix; and it is

FURTHER ORDERED, that pending said hearing and the final order of this Court upon said petition, said Victor 68
J. Dowling and Thomas E. Murray, Jr., as Receivers for Interborough Rapid Transit Company, be and they are hereby directed to refrain from making any payments of taxes payable by or with respect to the properties or franchises of Manhattan Railway Company, or with respect to the Federal income taxes payable by said company, or of the semi-annual interest instalment payable October 1, 1932, upon the Consolidated Mortgage Bonds of said Manhattan Railway Company, or the quarterly rental payable on said date upon the 43,510 shares of stock of said Manhattan Railway Company not participating in the Readjustment Plan of 1922 or the semi-annual payment of $25,000 for administration expenses of Manhattan Railway Company, and that pending said hearing and final order 68
no action done or taken by said Receivers of Interborough Rapid Transit Company shall be deemed to constitute either an adoption or rejection of the lease and other agreements mentioned in said petition.

Dated: New York, Sept. 28, 1932.

MANTON,
*United States Circuit Judge designated to hold a session of the District Court for the Southern District of New York.*

682 *American Brake Shoe Record.*

Doc. 36a
Order 20

## Order Respecting Sinking Fund Moneys.

IN THE

## UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,

683 against

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

In Equity
E 70-364

This cause came on to be heard at this term upon the application of Victor J. Dowling and Thomas E. Murray, Jr., the Receivers herein, praying for instructions with respect to sinking fund moneys held by Guaranty Trust Company of New York as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913, and was argued by counsel, and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED AND DECREED that said Receivers be
684 and they hereby are instructed and directed to take no action to secure the return to them of any sinking fund moneys now held by Guaranty Trust Company of New York, as Trustee under said First and Refunding Mortgage.

Dated, New York, N. Y., October 3, 1932.

MANTON,
*United States Circuit Judge designated to hold a term of the District Court for the Southern District of New York.*

Doc. 66a
Order 24

**Order Terminating Appointment and Employment of Chadbourne, Stanchfield & Levy as Solicitors and General Counsel for Interborough Receivers.**

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY *et al.*, Defendants. | In Equity E 70-364 |

The petition of Messrs. Chadbourne, Stanchfield & Levy, heretofore appointed as solicitors and general counsel for the receivers of the Interborough Rapid Transit Company, stating their determination to discontinue their said employment came on to be heard at this term and thereupon it was ordered,

That the determination of Chadbourne, Stanchfield & Levy to discontinue their employment as solicitors and general counsel for the receivers herein be and is hereby accepted and that the appointment and employment of Chadbourne, Stanchfield & Levy as solicitors and general counsel for said receivers be and the same is hereby terminated.

Dated, New York, N. Y., October 11, 1932.

MARTIN T. MANTON,
*United States Circuit Court Judge designated to hold a term of the District Court for the Southern District of New York.*

Doc. 66b
Order No. 25

## Order Appointing Hornblower, Miller, Miller & Boston as Solicitors and General Counsel for the Interborough Receivers.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

689

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY *et al.*, Defendants. | In Equity E 70-364 |

This cause coming on further to be heard at this term and it appearing to the court that it is necessary for Victor J. Dowling and Thomas E. Murray, Jr., receivers herein,
690 to employ solicitors and general counsel to aid them in the administration of their receivership in lieu and in place of Chadbourne, Stanchfield & Levy, and after reading the affidavit of Nathan L. Miller, verified October 11, 1932, and it appearing from the said affidavit that Hornblower, Miller, Miller and Boston, practicing attorneys and members of the bar of the State of New York with an office at 15 Broad Street, Borough of Manhattan, City,

County and State of New York, are competent to act as solicitors and general counsel for said receivers and are not disqualified because of any adverse interest, the undersigned judge, upon his own motion, hereby

SELECTS and APPOINTS the firm of Hornblower, Miller, Miller & Boston, to be solicitors and general counsel for the said receivers.

Dated, New York City, October 11, 1932.

MARTIN T. MANTON,
*U. S. Circuit Judge designated to hold a term of the District Court of the United States for the Southern District of New York.*

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Doc. 8.

**Receivers' Application No. 1.**

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E70-364. |

The petition of Thomas E. Murray, Jr., Receiver herein, acting on behalf of and for both Receivers, duly appointed by an order of this Court, dated August 26, 1932, upon

information and belief, respectfully shows to this Court as follows:

1. On August 26, 1932, by an order of this Court, your petitioner and Victor J. Dowling were duly appointed Receivers herein, and your petitioner has duly executed and filed the bond required by the terms of said order, and is now acting as such Receiver.

2. Your petitioner realizes that the duties of the Receivers are complicated, and that there are many intricate legal questions which will arise in the conduct of such
695 duties, and it is therefore imperative that your Receivers be allowed to employ solicitors and general counsel to represent them and advise them in their discharge of such duties, in order that they may properly administer their trust.

3. Your petitioner deems the firm of Chadbourne, Stanchfield & Levy, practicing attorneys and members of the bar of the State of New York, at No. 25 Broadway, Borough of Manhattan, City of New York, to be competent and qualified to represent them as their solicitors and general counsel in the administration of said trust for the following reasons:

Several members of the firm of Chadbourne, Stanchfield & Levy have had previous contact with the legal prob-
696 lems pertaining to traction matters both in New York City and Chicago, Illinois.

Furthermore, said firm has an extensive practice of equity receivership matters.

4. Your petitioner has been requested by the firm of Root, Clark & Buckner, counsel for the Committee for the Ten-Year Six Per Cent. Gold Notes of Interborough Rapid Transit Company, to retain said firm of Chadbourne, Stanchfield & Levy as the solicitors and general counsel for the Receivers in this cause, and your petitioner is of the belief that, because of the reasons above set forth, it is advisable to accept such suggestion.

WHEREFORE, your petitioner prays that an order be entered herein granting leave to your Receivers to employ said firm of Chadbourne, Stanchfield & Levy to be solicitors and general counsel for them as such Receivers in this cause.

Dated, New York, N. Y., August 26, 1932.

THOMAS E. MURRAY, JR.,
Receiver, Acting on Behalf of
and for Both the Receivers.

Doc. 8.

**Affidavit by Receivers' Counsel.**

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,
against
701
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

THOMAS L. CHADBOURNE, being duly sworn, deposes and says:

1. That he is one of the partners of the firm of Chadbourne, Stanchfield & Levy, practicing attorneys and members of the Bar of the State of New York, of 25 Broadway, Borough of Manhattan, City of New York.
702

2. That several members of the firm of Chadbourne, Stanchfield & Levy have had contact with the intricate and numerous legal problems in connection with traction matters, both in the City of New York and in the City of Chicago, Illinois. Furthermore, the firm of Chadbourne, Stanchfield & Levy has an extensive practice in connection with equity receivership causes.

3. That such firm was appointed counsel for the Committee for the Ten-Year Six Per Cent. Gold Notes of Inter-

borough Rapid Transit Company on or about July 18, 1932, but such firm has, prior to the institution of this cause, resigned as counsel for such Committee. Such firm has acted on some occasions as attorneys for the firm of Hayden, Stone & Co. and for some members of Hayden, Stone & Co. Your deponent believes that the firm of Hayden, Stone & Co. and possibly some members of such firm may be interested in securities of Interborough Rapid Transit Company. However, the firm of Chadbourne, Stanchfield & Levy does not and will not represent any creditor of Interborough Rapid Transit Company or any other person interested in the above cause or in the receivership estate.

4. Such firm of Chadbourne, Stanchfield & Levy has not at any time been counsel for Interborough Rapid Transit Company. Said firm neither have nor represent nor does any member or associate of said firm have or represent any interest adverse to Interborough Rapid Transit Company or the Receivers of Interborough Rapid Transit Company appointed by order of this Court entered August 26, 1932.

THOMAS L. CHADBOURNE.

Sworn to before me this
26 day of August, 1932.

ARTHUR G. PEACOCK,
Notary Public,
Queens County.
Certificate filed in New York County No. 300.

Doc. 9.

## Consent and Waiver of Notice as to Appointment of Receivers' Counsel.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

707 THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

We hereby waive notice of the within petition and consent to the granting and entering of the attached order authorizing the Receivers herein to employ as their solicitors and general counsel herein the firm of Chadbourne, Stanchfield & Levy.

708 Dated, New York, N. Y., August 26, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

JAMES L. QUACKENBUSH,
Attorney for Defendant.

Doc. 10

## Petition for Order Granting Leave to Intervene to Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

*To the Judges of the District Court of the United States for the Southern District of New York:*

The petition of J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee acting for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds due January 1, 1966, on behalf of themselves and on behalf of all other owners of such Bonds (hereinafter called the "Bonds"), who may deposit their Bonds with the Committee, respectfully shows as follows:

712 *American Brake Shoe Record.*
*Petition for Leave to Intervene.*

(1) Since 1919, the Committee, with minor changes in personnel, has acted for the Bonds. On August 31, 1932, the Committee by published notice called for the deposit of Bonds with its designated Depositary.

(2) The members of the Committee represent a substantial amount of the Bonds.

(3) That on or about August 25, 1932, The American Brake Shoe and Foundry Company, the plaintiff herein, filed in this Court its Bill of Complaint against the Interborough Rapid Transit Company as a general creditor, and thereupon and on or about August 26, 1932, Victor
713 J. Dowling and Thomas E. Murray, Jr., of the City of New York, were duly appointed temporary receivers of the defendant Interborough Rapid Transit Company and its property in said suit.

(4) Your petitioners are informed and believe that numerous questions of vital and far-reaching importance in so far as they affect the interests of the Bonds represented by the Committee will be raised in the above-entitled cause and come before this Court for its decision thereon. Your petitioners refer to the Bill of Complaint herein of The American Brake Shoe and Foundry Company, plaintiff, wherein the facts with regard to certain of these matters are set forth at length.

714 (5) Your petitioners, as such Committee, allege that in view of the importance to the Bonds which they represent of the questions which will arise from time to time in this cause, they should be permitted to intervene in this cause.

WHEREFORE, your petitioners pray that an order be entered herein permitting your petitioners, as the Committee acting for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds, to intervene as a

party defendant in this cause with the right to plead on behalf of the holders of the Bonds and to be heard on all matters arising in this cause, and that your petitioners be entitled to notice of all proceedings herein and that your petitioners have such other and further relief as to this Court may seem just and proper.

Dated, New York, N. Y., August 31, 1932.

J. P. MORGAN,
ARTHUR M. ANDERSON,
FREDERIC W. ALLEN,
GEORGE F. BAKER,
EDWARD D. DUFFIELD,
F. H. ECKER,
HALSTEAD G. FREEMAN,
DARWIN P. KINGSLEY,
G. HERMANN KINNICUTT,
H. C. MCELDOWNEY, and
CHARLES E. MITCHELL,
as the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds,
by ARTHUR M. ANDERSON,
Vice-Chairman.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for Petitioners.

EDWIN S. S. SUNDERLAND, of Counsel.

Doc. 11

**Petition for Order Granting Leave to Intervene to the Committee Constituted by and Acting under the Deposit Agreement Dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

719

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

*To the Judges of the District Court of the United States for the Southern District of New York:*

720 The petition of J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes (hereinafter called the "Deposit Agreement"), on behalf of themselves and on behalf of all other owners of Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes (here-

inafter called the "Notes"), who may elect to become parties to the Deposit Agreement, respectfully shows as follows:

(1) Since the recent call for deposits under the Deposit Agreement of July 19, 1932, there have been deposited with the Depositary under the Deposit Agreement a substantial amount out of the principal amount of $31,672,100 of the Notes.

(2) That on or about August 25, 1932, the American Brake Shoe and Foundry Company, the plaintiff herein, filed in this Court its Bill of Complaint against the Interborough Rapid Transit Company as a general creditor, and thereupon and on or about August 26, 1932, Victor J. Dowling and Thomas E. Murray, Jr., of the City of New York, were duly appointed temporary receivers of the defendant Interborough Rapid Transit Company and its property in said suit.

(3) Your petitioners are informed and believe that numerous questions of vital and far-reaching importance in so far as they affect the interests of the Notes represented by the Committee will be raised in the above-entitled cause and come before this Court for its decision thereon. Your petitioners refer to the Bill of Complaint herein of The American Brake Shoe and Foundry Company, plaintiff, wherein the facts with regard to certain of these matters are set forth at length.

(4) Your petitioners, as such Committee, allege that in view of the importance to the Notes which they represent of the questions which will arise from time to time in this cause, they should be permitted to intervene in this cause for the purpose of protecting the rights and interests of the holders of Notes represented by them.

724 WHEREFORE, Your petitioners pray that an order be entered herein permitting your petitioners, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, to intervene as a party defendant in this cause with the right to plead on behalf of the holders of the Notes and to be heard in all matters arising in this cause, and that your petitioners be entitled to notice of all proceedings herein and that your petitioners have such other and further relief as to this Court may seem just and proper.

725 Dated, New York, N. Y., August 31, 1932.

J. P. MORGAN,
ARTHUR M. ANDERSON,
FREDERIC W. ALLEN,
GEORGE F. BAKER,
EDWARD D. DUFFIELD,
F. H. ECKER,
HALSTEAD G. FREEMAN,
DARWIN P. KINGSLEY,
G. HERMANN KINNICUTT,
H. C. MCELDOWNEY, and
CHARLES E. MITCHELL,
as the Committee constituted by and acting
726 under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes,
By ARTHUR M. ANDERSON,
Vice-Chairman.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for Petitioners.

EDWIN S. S. SUNDERLAND, of Counsel.

Doc. 12

**Petition for Order for Intervention of Committee for the Protection of the Holders of Ten-Year 6% Gold Notes of Interborough Rapid Transit Company under Deposit Agreement Dated as of July 18, 1932.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

*To the Honorable the Judges of the District Court of the United States for the Southern District of New York:*

The petition of Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, constituting a Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of the above-named defendant, by their solicitors, Root, Clark & Buckner, respectfully shows to this Court and alleges:

1. The above-entitled suit was commenced on or about August 25, 1932, by the above-named plaintiff, a creditor of the above-named defendant, by the filing in this Court of a creditor's bill in equity against said defendant. On or about said day said defendant appeared in said suit and by its answer admitted the allegations of the bill in equity filed herein, and consented to the appointment of receivers of its property, as prayed for in the bill of complaint, and thereupon, and on or about August 26, 1932, Victor J. Dowling and Thomas E. Murray, Jr., were duly

appointed temporary Receivers of the above-named defendant and of all of the property of said defendant, and thereafter the said Thomas E. Murray, Jr., qualified as Receiver.

2. By order of this Court appointing the said Receivers, said Receivers were authorized, inter alia, to take possession of all the properties and assets of the said defendant and to run, manage and operate the railroads, properties and assets of the said defendant and to exercise the authority and franchises of the said defendant and discharge its public duties and to preserve and protect its system, properties and assets in proper condition and repair and to protect the title and possession and secure and develop the business of the same and to collect and receive the rents, income, tolls and profits of the railroads, properties and assets of the said defendant.

3. By order of this Court in appointing the said Receivers, it was ordered that at 10.30 o'clock in the forenoon on September 22, 1932, at Room 439 at the United States Post Office Building in the City of New York, the parties to the above-entitled suit show cause before the Hon. Martin T. Manton, a United States Circuit Judge designated to hold a session of the District Court for the Southern District of New York, why such receivership should not be continued during the pendency of the above-entitled suit and upon the hearing thereof any other creditor of the said defendant or other party in interest may be heard.

4. On or about August 26, 1932, a suit was commenced by the above-named plaintiff in the United States District Court for the Eastern District of New York, against the above-named defendant, by filing in said Court a creditor's bill in equity against said defendant. On or about said day said defendant appeared in said action, and by its answer admitted the allegations of said bill in equity and consented to the appointment of temporary receivers of said defendant and of all of the property of said defendant

(ancillary to the appointment of Receivers thereof by this Court), as prayed for in the complaint, and thereupon, and on or about August 26, 1932, the said Victor J. Dowling and Thomas E. Murray, Jr., were duly appointed temporary Ancillary Receivers of the above-named defendant, ancillary to their appointment as temporary Receivers by this Court.

5. On or about October 1, 1922, the above-named defendant entered into an indenture, dated as of October 1, 1922, by and between the above-named defendant, party of the first part, and Guaranty Trust Company of New York, a corporation organized and existing under the laws of the United States of America, as Trustee, party of the second part. Said indenture provided for the issuance of not exceeding $15,000,000 Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, of the above-named defendant. Upon information and belief, the above-named defendant has issued under said indenture $10,500,000 Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, all of which are now outstanding.

6. The above-named defendant by its answer in the above-entitled suit has admitted that it is and will be without financial resources to meet in full specified contractual obligations, including the six months' interest on the Ten-Year Six Per Cent. Gold Notes due October 1, 1932, amounting to $315,000, and the principal of said Ten-Year Six Per Cent. Gold Notes due and payable October 1, 1932, amounting to $10,500,000.

7. Your petitioners are acting as a Committee for the protection of the holders of the said Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of the above-named defendant, under a Deposit Agreement, dated as of July 18, 1932, a copy of which is annexed hereto and made a part hereof; and, as such Committee, represent the holders of a substantial number of said Ten-Year Six Per Cent. Gold Notes due October 1, 1932.

8. The conduct of the receivership involves questions which are of serious import to the holders of said Ten-

Year Six Per Cent. Gold Notes, due October 1, 1932, of the above-named defendant and questions of business policy in the determination of which your petitioners desire to advise and co-operate with the Receivers and their solicitors.

9. It is the purpose and wish of your petitioners to assist and co-operate with this Court and the Receivers, and, when addressed, your petitioners will be ready and willing to present to this Court the views of your petitioners and the noteholders whom they represent in any matter or thing upon which your petitioners' views may be requested.

10. This petition is executed by Charles Hayden, the Chairman of said Committee, and said Charles Hayden has been authorized so to do by said Committee.

WHEREFORE, it is respectfully prayed that an order permitting the intervention of your petitioners, in form and substance as hereto annexed, be issued by this Court, for all of which no other or previous application has been made.

CHARLES HAYDEN,
EARLE BAILIE,
GRAYSON M.-P. MURPHY,
ALBERT H. WIGGIN,
WILLIS D. WOOD,
constituting a Committee for the protection of the holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company,

by CHARLES HAYDEN,
Chairman.

ROOT, CLARK & BUCKNER,
Solicitors for Petitioners,
Office & P. O. Address,
31 Nassau Street,
Borough of Manhattan,
New York City.

(Below-described Deposit Agreement was attached)

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INTERBOROUGH RAPID TRANSIT COMPANY

TEN-YEAR SIX PER CENT. GOLD NOTES

DUE OCTOBER 1, 1932.

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DEPOSIT AGREEMENT

Dated as of July 18, 1932.

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CHARLES HAYDEN, Chairman
EARLE BAILIE
GRAYSON M.-P. MURPHY
ALBERT H. WIGGIN
WILLIS D. WOOD

*Committee*

*Counsel*
ROOT, CLARK & BUCKNER,
31 Nassau Street,
New York, N. Y.

*Secretary*
RAYMOND B. HINDLE,
25 Broad Street,
New York, N. Y.

*Depositary*
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,
11 Broad Street,
New York, N. Y.

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Doc. 13

## Petition of Manhattan Railway Company for Extension of Receivership and Appointment of Separate Receiver for Lessor.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

743 THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff,

against

INTERBOROUGH RAPID TRANSIT COMPANY, Defendant.

In Equity E 70-364

IN THE MATTER OF The Petition of MANHATTAN RAILWAY COMPANY.

744 The petition of Manhattan Railway Company, by Dills, Muecke & Schelker, its solicitors, respectfully shows as follows:

FIRST: This cause is a general creditor's suit. For the contents of the Bill of Complaint and of the answer of the defendant to said bill, reference is made to said bill and answer of record in this cause.

By an order of this court duly entered in this cause on August 26, 1932, made on the Bill of Complaint and on the answer of the defendant thereto, Victor J. Dowling and Thomas E. Murray, Jr., were duly appointed tempo-

rary receivers of the defendant, Interborough Rapid Transit Company, and of its properties, with the powers and duties prescribed in said order. For the precise terms of said order reference is made to the original order of record in this cause. Thomas E. Murray, Jr., one of the receivers appointed by this court as aforesaid, has duly qualified as such receiver and has entered into possession of the properties of said defendant, including the properties leased to it by the petitioner as hereinafter set forth, and is now operating the same and collecting the rents, issues and profits thereof.

SECOND: Your petitioner, a railroad corporation, organized and existing under the laws of the State of New York, owns a system of elevated railroads in the Borough of Manhattan and the Bronx, in the City of New York, which system of railroads your petitioner leased to the defendant for the term of nine hundred and ninety-nine (999) years from November 1, 1875, under the terms and conditions and for the rentals in said indenture of lease set forth. At the time of the appointment of the receivers in this cause the defendant was in possession of and operating the elevated railroads leased to it by the petitioner.

In and by the aforesaid lease the defendant as lessee covenanted and agreed that it would each and every year during the term of the lease from January 1, 1906, pay to the petitioner as lessor, as rent for the demised property, annual dividends at the time specified in the lease at the rate of 7% per annum on the shares of stock of the petitioner.

The defendant as lessee assumed and covenanted and agreed to pay to the lessor as rent, as the same became due, the interest on the outstanding bonds of the petitioner as lessor.

The defendant as lessee covenanted and agreed that it would pay and discharge as rent, as and when the same became due, any and all taxes, assessments and charges

whatsoever, levied, assessed or imposed upon the petitioner as lessor, its capital, or shares of capital stock, or dividends, or upon the demised railroads, premises, real estate, personal property, franchises, assessments or any part thereof, or the business, earnings or income of the lessor, or for the use or enjoyment thereof, by the United States, state, municipal or other lawful authority.

At the time the receivers were appointed herein there were outstanding the following securities of your petitioner:

749 $40,683,000 principal amount of Consolidated Mortgage 4% Bonds issued under and pursuant to and secured by an Indenture dated February 26, 1890, and a Supplemental Indenture dated June 13, 1899, between your petitioner and Central Trust Company of New York (now Central Hanover Bank and Trust Company) whereby there is mortgaged all the railroad properties and certain other properties of your petitioner;

$4,523,000 of Second Mortgage 4% Bonds issued under and pursuant to and secured by an Indenture dated June 1, 1913, between your petitioner and The Equitable Trust Company (now The Chase National Bank of the City of New York) whereby there is mortgaged all the railroad properties and
750 certain other properties of the petitioner, but subject to the lien created by said Indentures to Central Trust Company of New York (now Central Hanover Bank and Trust Company);

600,000 shares of capital stock of the par value of $100 each.

In 1922 a voluntary Plan of Readjustment was made in and by which it was provided that as to all holders of capital stock of the petitioner, who should assent to the Plan of Readjustment, the 7% annual rate of guaranteed

dividend rental on such capital stock as fixed in the aforesaid lease from the petitioner to defendant should be reduced, subject to the terms and conditions of the Plan of Readjustment, to the rate of 5% per annum after July 1, 1924, with the provision that in any fiscal year in which neither the net earnings of the defendant, nor the net earnings of the "Manhattan Leased Lines" as defined in the Plan of Readjustment would be sufficient to pay the whole of such guaranteed dividend rental, the defendant should pay and distribute as provided in the aforesaid lease on account of such dividend rental an amount equal to the net earnings of the Interborough Company or the net earnings of the "Manhattan Leased Lines," whichever amount should be the larger.

Taxes in excess of $860,000 against the special franchises and real estate belonging to the petitioner have become due and are now unpaid. In the complaint herein (paragraph 13) it is alleged as follows:

> "On information and belief, that the defendant has neglected and failed to pay certain taxes for 1932 duly assessed by the City of New York against the special franchises and real estate belonging to the Manhattan Railway Company, the amount of such unpaid taxes with interest now due thereon being in excess of $860,000; that defendant's lessor, Manhattan Railway Company, has formally demanded in writing that such taxes be paid but that defendant has neglected and failed and continues to neglect and fail to comply with such demand and make such payment; on information and belief that such failure and such refusal constitutes an act of default on the part of the defendant under the aforesaid lease from the Manhattan Railway Company and if continued for a period of ninety (90) days from the date of demand of the Manhattan Railway Company, will constitute an additional act of default under the terms of the defendant's First and Refunding Mortgage."

754 The foregoing allegation of the complaint is admitted by the answer herein.

In the complaint herein (paragraph 15) it is alleged on information and belief that the defendant is and will be without financial resources to meet in full certain contractual obligations which are required of it through the terms of its mortgage, the indenture securing its notes, and the lease of the petitioner, which include the following:

> "Rental payments due under the lease from Manhattan Railway Company, amounting to $914,802.50, on October 1, 1932, being interest on the
755 Manhattan 4% Bonds and rental for one quarter on the non-assenting Seven Per Cent. Stock of the Manhattan Company;
>
> "Rental payments due under the said Manhattan lease on December 1, 1932, amounting to $90,460."

The foregoing allegation of the complaint is admitted by the answer.

THIRD: In and by the aforesaid lease of the petitioner to defendant there is the following provision in respect of default by the defendant on performance of the covenants and agreements contained in the lease:

> "The lessee further covenants and agrees that in
756 case of default by it in the payment of the cash or dividend rentals in this lease reserved and agreed to be paid, and if said rentals, or any part thereof, shall remain unpaid for the space of ninety days from and after the time when they shall become due and payable, or if the said lessee shall be in default in the performance of any of the covenants or agreements in this lease contained and on its part to be kept and performed as aforesaid, and such default shall continue for the period of ninety days after notice and demand of performance by the

lessee, given in writing by the lessor to the lessee, or if the lessee shall fail or refuse to comply with any decision of arbitrators appointed as herein provided, for sixty days after service of notice of such decision upon it, then, and in any of said events, the term by this lease created, granted and demised shall at the option of the said lessor expire and cease and determine, and the lessor shall have the right to enter upon and take possession of all and singular the property by this lease granted and demised, and the same have and possess and enjoy as of its former estate, and without such entry may recover possession thereof in the manner provided by statute, by summary proceedings; it being covenanted and agreed that the term hereby granted shall expire after continued default as aforesaid, at the election of the lessor and upon written notice of such election being served on the lessee, and that all right of any further demand or re-entry other than that above specifically referred to is hereby waived by the lessee. The foregoing remedies are cumulative and shall not be construed to take away or abridge any other remedy, or right existing by law, or under any other provision of this lease."

In each of the two mortgages of the petitioner securing its outstanding bonds there are provisions that, on defaults in the payment of the interest on the outstanding bonds and the continuance of such defaults for short periods respectively set forth in said respective mortgages, proceedings may be instituted by the Trustees respectively named in the respective mortgages and shall be instituted by said Trustees respectively upon the request of a specified number of holders of bonds secured by such mortgages respectively to foreclose the liens of the respective mortgages.

760 *American Brake Shoe Record.*
*Petition for Extension of Receivership.*

FOURTH: The interest on the aforesaid bonds is payable semi-annually until the bonds mature. The entire system of elevated railroads of the petitioner is now in the possession of this court through its said receivers appointed in this cause. The defendant by the terms of the aforesaid lease agreed to pay the interest on the bonds of the petitioner as it became due. Your petitioner has no resources with which to meet the interest on the mortgage indebtedness of its system of elevated railroads leased to the defendant, or to meet the other indebtedness and liabilities of your petitioner other than the rentals payable under the lease made by your petitioner to the de-
761 fendant, as part of which said defendant agreed to pay such fixed charges and such rentals and to perform the other covenants therein contained.

FIFTH: In the complaint herein (paragraph 6) there is the following allegation:

> "On information and belief that on or about March 19, 1913, the Public Service Commission for the First District issued to the defendant, and the defendant accepted a certain certificate for the construction, equipment, maintenance and operation of certain extensions to the elevated lines, or some of them, operated by the defendant under said lease; and that said elevated extensions have been con-
762 structed and equipped and are now operated by the defendant under the terms of said certificate in conjunction with, and as a part of the elevated system leased by the defendant from said Manhattan Company."

The foregoing allegation is admitted by the answer.

Since the lease by the petitioner to the defendant was made the defendant has operated under a single management and as a single system all the lines owned, controlled and operated by it including the subways leased to it by the City of New York and the elevated railroads leased to it by the petitioner.

In view of the foregoing facts the rights of your petitioner are very closely interwoven with rights which this court has undertaken to administer in this cause.

Your petitioner prays:

1. That your petitioner may become party defendant to said suit for the protection of its interests and those of its creditors.

2. That the receivership under the Bill of Complaint in this cause be extended so as expressly to embrace the interest of your petitioner in said property, your petitioner submitting itself and its property to the jurisdiction of this court, and that such extension of such receivership shall not be deemed in any way to prejudice, affect, impair, diminish, enlarge or augment the rights of Manhattan Railway Company against Interborough Rapid Transit Company or its said receivers, or in any way to prejudice, affect, impair, diminish, enlarge or augment the rights of Interborough Rapid Transit Company or its said receivers against Manhattan Railway Company.

3. That said receivers be further directed to keep separate accounts of the railroads owned by the petitioner and now in possession of the receivers herein, and that the rents, issues, profits and income from such properties be segregated and applied under the orders or decree of this court to the end that said railroads and property of your petitioner may be protected and preserved.

4. That your petitioner may have such further relief as may be just.

MANHATTAN RAILWAY COMPANY,
By CHAS. G. MULLIN,
Secretary.

DUANE R. DILLS,
DILLS, MUECKE & SCHELKER,
Solicitors and Counsel for Petitioner,
New York City, New York.

Doc. 15

## Notice of Motion for Leave to Intervene—Committee for Manhattan 7% Stock.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

*Sirs:*

You and each of you will PLEASE TAKE NOTICE that as Solicitors for Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, acting as the Protective Committee for the Seven Per Cent. Guaranteed Stock of the Manhattan Railway Company, we have filed in the office of the Clerk of this Court in the above entitled cause their petition for intervention and motion for leave to intervene herein, copies of which said petition and motion for leave to intervene are hereto attached and herewith served upon you and each of you; and that we shall move the Court on Monday, September 12, 1932, at eleven o'clock A. M. on that day, or as soon thereafter as counsel can be heard, in Room 439, Old

Post Office Building, for an order allowing intervention, and for such further relief in the premises as may be just.

Dated, New York, September 8, 1932.

Yours, etc.,

MARSHALL & WEHLE,
Solicitors for Petitioners,
No. 50 Broadway,
New York, N. Y.

To:

MESSRS. CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Victor J. Dowling and Thomas E. Murray, Jr., Temporary Receiver of Interborough Rapid Transit Company,
25 Broadway, New York, N. Y.

MESSRS. HUGHES, SCHURMAN & DWIGHT,
Solicitors for William Roberts, Temporary Receiver of Manhattan Railway Company,
100 Broadway, New York, N. Y.

Doc. 16

## Proposed Order—Intervention of Committee for Manhattan 7% Stock.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against 773 INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

This cause coming on to be heard upon the petition for intervention by Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, as the Protective Committee for holders of Seven Per Cent. Guaranteed Stock of Manhattan Railway Company, and upon motion pursuant thereto, and the Court being duly advised, it is

ORDERED that said Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, as the Protective Committee for Manhattan Rail-
771 way Company Seven Per Cent. Guaranteed Stock, be and they hereby are permitted to intervene as such Protective Committee in this cause as a party-defendant, and to appear for and represent owners and holders of such stock who may make deposits with said Committee; and that notices of further proceedings in this cause shall be served upon Messrs. Marshall & Wehle, No. 50 Broadway, New York City, Solicitors for said Committee.

Dated, New York, N. Y., September , 1932.

.....

*U. S. D. J.*

Doc. 17

## Motion for Leave to Intervene—Committee for Manhattan 7% Stock.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

Come now Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, owning and representing certain shares of capital stock of Manhattan Railway Company called Seven Per Cent. Guaranteed Stock and acting as the Protective Committee for holders of such stock pursuant to a Deposit Agreement as of August 26, 1932, who, as such Committee and on behalf of such holders of such stock as may make deposits under said Deposit Agreement, move the Court for leave to the petitioners as such Protective Committee to intervene as a party-defendant in this cause.

Dated, New York, N. Y., September 8, 1932.

MARSHALL & WEHLE,
Solicitors for Petitioners.

## Petition for Intervention by Protective Committee for Holders of 7% Guaranteed Stock of Manhattan Railway Company.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

779

*To the Honorable the Judges of the District Court of the United States for the Southern District of New York:*

Your petitioners, Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, as the Protective Committee acting for holders of Seven Per Cent. Guaranteed Stock of Manhattan Railway Company, which stock will be hereinafter more fully described, are acting for themselves and also on behalf of other holders of such stock who have already deposited or may hereafter deposit their stock with the Depositary acting under a certain Protective Agreement executed by your petitioners as of August 26, 1932, and respectfully state:

780

FIRST: That the said Seven Per Cent. Guaranteed Stock of Manhattan Railway Company is the stock to the holders of which the defendant herein, Interborough Rapid Tran-

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sit Company, by instrument of January 1, 1903, as set forth in the eleventh paragraph of the bill of complaint herein, undertook to pay annually an amount equal to seven per cent. (7%) per annum upon each share; that as set forth in the said eleventh paragraph of the bill of complaint said undertaking of said defendant herein to pay such seven per cent. annually upon such stock originally applied to 600,000 shares thereof, but that as to 556,490 shares thereof, now known as "Manhattan Railway Modified Stock," the rights of holders have come to be modified by contract; and that the said original obligation and liability of said defendant, Interborough Rapid Transit Company, to pay annually said seven per cent. applies 782
only to 43,510 shares of said capital stock of Manhattan Railway Company, which stock is commonly referred to, and is herein mentioned as its "Seven Per Cent. Guaranteed Stock."

SECOND: That the said obligation of said defendant herein, Interborough Rapid Transit Company, to the holders of such Seven Per Cent. Guaranteed Stock is evidenced upon the face of each certificate for such stock, by its express undertaking in the following words and figures:

> "Dividends amounting to six per cent. per annum and an additional amount, if earned, not exceeding one per cent. per annum, until January first, 1906, and after that date, dividends amounting to seven 783
> (7) per cent. per annum, upon the par value of the outstanding capital stock of the Manhattan Railway Company are guaranteed, and will be paid by the undersigned, in accordance with the terms and provisions of a certain Indenture made between the Manhattan Railway Company and the undersigned, dated the first day of January, 1903.
>
> INTERBOROUGH RAPID TRANSIT COMPANY,
> by.....
> Treasurer."

84 *American Brake Shoe Record.*
*Petition for Leave to Intervene.*

THIRD: That your petitioners for some time past have personally owned and now own, or as agents or fiduciaries have represented and now represent, a substantial amount of the said 43,510 shares of Seven Per Cent. Guaranteed Stock presently outstanding; that your petitioners, acting as such Protective Committee, as shown by published notices of August 26th and August 27th, 1932, copies of which are attached hereto as Exhibit "1," made its first call for deposits of Seven Per Cent. Guaranteed Stock and also mailed to all holders of record on the books of Manhattan Railway Company as of August 22, 1932, a call
785 for such stock and also a copy of the Protective Agreement hereinabove referred to, and that the Depositary named in said published notices and in said Protective Agreement is now in the course of receiving deposits pursuant to such call.

FOURTH: That on August 26, 1932, in this cause, temporary receivers were appointed for the defendant herein, Interborough Rapid Transit Company; and that thereafter on September 6, 1932, in this cause, and upon petition of Manhattan Railway Company, a temporary receiver was appointed for Manhattan Railway Company.

FIFTH: That through the said undertaking of defendant, Interborough Rapid Transit Company, as set forth
786 in paragraphs second and third hereof, there will be due on October 1, 1932, to the holders of said Seven Per Cent. Guaranteed Stock a payment equal to $1.75 upon each share thereof, or an aggregate amount of $76,142.50.

SIXTH: That the policies to be determined upon by the said temporary receivers of the defendant, Interborough Rapid Transit Company, and of the Manhattan Railway Company from time to time as officers of this Court through proceedings in this cause with regard to the said undertaking of January 1, 1903, of the defendant herein,

Interborough Rapid Transit Company, hereinabove set forth, or any of the matters referred to in the bill of complaint herein, or in other matters, will profoundly involve and affect the rights of the holders of the said Seven Per Cent. Guaranteed Stock of Manhattan Railway Company; and that by reason of the interest which they represent, your petitioners should be allowed to intervene in this cause.

WHEREFORE, your petitioners pray that an order be entered herein permitting your petitioners as the Protective Committee for Manhattan Railway Company Seven Per Cent. Guaranteed Stock to intervene as a party-defendant in this cause and for such other and further relief as to this Court may seem proper.

Dated, September 8th, 1932.

HAROLD PALMER,
NORMAN JOHNSON,
STANLEY R. LATSHAW,
HAROLD SWAIN,
JOHN W. APPEL, JUNIOR,
as the Protective Committee for Seven Per Cent. Guaranteed Stock of Manhattan Railway Company,

by HAROLD PALMER,
Chairman,

NORMAN JOHNSON,
Secretary.

MARSHALL & WEHLE,
Solicitors.

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**Exhibit 1, With Petition for Intervention by Protective Committee.**

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|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

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(N. Y. Sun, 8/26/32)

PROTECTIVE COMMITTEE

MANHATTAN RAILWAY COMPANY

Seven Per Cent. Guaranteed Stock

CALL FOR DEPOSIT

To the Holders of Seven Per Cent. Guaranteed Stock of Manhattan Railway Company.

792 In the critical situation for holders of the 7 per cent guaranteed stock of the Manhattan Railway Company brought about by the appointment of receivers for the Interborough Rapid Transit Company, lessee of the Manhattan properties, the undersigned, owning or controlling substantial amounts of the stock, have consented to serve as a protective committee to safeguard its interest.

We urge immediate deposit of your stock under terms of a brief deposit agreement which has already been executed by us, copies of which are being mailed to stock-

holders of record and can also be obtained from the Depositary.

New York, N. Y., August 26, 1932.

MARSHALL & WEHLE,
50 Broadway,
New York, N. Y.,
Counsel

THE COMMERCIAL NATIONAL BANK & TRUST COMPANY OF NEW YORK,
Depositary,
50 Wall Street,
New York

HAROLD PALMER,
Chairman

NORMAN JOHNSON,
Secretary,
50 Broadway,
New York, N. Y.
(Phone: CAledonia 5-4838)

JOHN W. APPEL, JR.
STANLEY R. LATSHAW
HAROLD SWAIN

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(N. Y. Times, 8/27/32)

## NOTICES TO SECURITIES OWNERS

Redemption—Dividends—Meetings—Sinking Funds—Other Notices

The New York Times has a greater circulation among financiers and investors than any other American newspaper

FINANCIAL NOTICES

PROTECTIVE COMMITTEE
MANHATTAN RAILWAY COMPANY
Seven Per Cent. Guaranteed Stock

CALL FOR DEPOSIT

*To the Holders of Seven Per Cent. Guaranteed Stock of Manhattan Railway Company:*

In the critical situation for holders of the 7% guaranteed stock of the Manhattan Railway Company brought about

by the appointment of receivers for the Interborough Rapid Transit Company, lessee of the Manhattan properties, the undersigned, owning or controlling substantial amounts of the stock, have consented to serve as a protective committee to safeguard its interests.

We urge immediate deposit of your stock under terms of a brief deposit agreement which has already been executed by us, copies of which are being mailed to stockholders of record and can also be obtained from the Depositary.

New York, N. Y., August 27, 1932.

MARSHALL & WEHLE,
50 Broadway,
New York, N. Y.,
*Counsel*

THE COMMERCIAL NATIONAL BANK & TRUST COMPANY OF NEW YORK,
56 Wall Street,
New York, N. Y.,
*Depositary.*

HAROLD PALMER,
*Chairman,*

NORMAN JOHNSON,
*Secretary,*
50 Broadway,
New York, N. Y.
(Phone: DIgby 4-9556)

JOHN W. APPEL, JR.
STANLEY R. LATSHAW
HAROLD SWAIN

Doc. 19

## Receivers' Petition Respecting Seven Per Cent. Notes.

RECEIVERS' APPLICATION NO. 2—SEPTEMBER 1, 1932.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity No. E 70-364 |

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The petition of Thomas E. Murray, Jr., Receiver herein, acting on behalf of and for both Receivers who were duly appointed by an order of this Court, dated August 26, 1932, in the above-entitled cause, upon information and belief, respectfully shows to this Court as follows:

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1. On August 26, 1932, by an order of this Court, your petitioner and Victor J. Dowling were duly appointed Receivers herein, and your petitioner has duly executed and filed the bond required by the terms of said order, and is now acting as such Receiver, Victor J. Dowling being at present absent from the United States.

2. From such limited investigation and examination of the affairs of the defendant, Interborough Rapid Transit Company, as your petitioner has been able to make in the

brief time that has elapsed since August 26, 1932, he is informed and believes, and upon such information and belief states the following:

3. Under a Collateral Indenture dated September 1, 1922, between the defendant and Bankers Trust Company of New York, as Trustee, there have been issued and are now outstanding Thirty-one million six hundred seventy-two thousand one hundred Dollars ($31,672,100) principal amount of Ten-Year Convertible 7% Gold Notes of the defendant, which by their terms mature and become due and payable on September 1, 1932. Bankers Trust Com-
803 pany, as the Trustee named in and acting under said Indenture, has in its possession more than Fifty-four million Dollars ($54,000,000) principal amount of First and Refunding Mortgage 5% Gold Bonds of the defendant as security for said Notes. Said Bankers Trust Company is a corporation organized and existing under the laws of the State of New York, and its principal office is located in the County of New York in said State.

4. According to the provisions of said Collateral Indenture, said Bonds were issued under and pursuant to a First and Refunding Mortgage of the defendant dated March 20, 1913, to Guaranty Trust Company of New York, as Trustee; in addition to such Fifty-four million Dollars ($54,000,000) principal amount of such First and Refund-
804 ing Mortgage 5% Gold Bonds there are outstanding in the hands of the public more than One hundred thirty-two million Dollars ($132,000,000) in principal amount of such First and Refunding Mortgage 5% Gold Bonds.

Said Collateral Indenture, in Article Six thereof, contains the following provisions, among others:

> "SEC. 2. In case of the happening of one or more of the following events—elsewhere in this indenture sometimes termed 'events of default'—that is to say:

(1) Default in the due and punctual payment of the principal of any of the notes hereby secured, when the same shall have become due and payable, whether at maturity or by declaration or otherwise;

(2) Default in the payment of any interest on any of the notes hereby secured, when and as the same shall have become payable as therein and herein expressed, which default shall have continued for the period of thirty days;

* * * * * *

(6) A receiver of the Company or its property shall be appointed, and the order of the Court appointing such receiver shall continue in effect for the period of sixty days;

* * * * * *

SEC. 3. In case of the happening of one or more of the events of default enumerated in Section 2 of this Article Six, then, and in each and every such case, the Trustee in its discretion shall be entitled, either personally or by its agents or attorneys, to proceed, and forthwith may proceed, to sell and convert into money, singly or collectively, the pledged bonds; and upon the written request either of the holders of not less than 25% in principal amount of the notes at the time outstanding, or of any one holder of not less than 10% in amount of such notes who shall have been the holder of notes to that amount for at least six months next preceding the delivery of such request, and upon being indemnified as hereinafter provided, it shall be the duty of the Trustee so to do.

Such sale or sales shall be at public auction at such place in the Borough of Manhattan, City of New York, State of New York, and at such time

and upon such terms as the Trustee may fix and briefly specify in the notice of sale to be given as herein provided or as may be required by law.

Notice of any sale, whether under and by virtue of the power of sale herein conferred, or under or by virtue of any judgment or decree of foreclosure and sale or any other judicial proceedings, shall state the time when and the place where the same is to be made, and shall contain a brief general description of the property to be sold, and shall be sufficiently given if published once in each week for four successive weeks prior to such sale in two newspapers of general circulation in the Borough of Manhattan, City of New York.

The Trustee may adjourn from time to time any sale by it to be made under the provisions of this indenture by announcement at the time and place appointed for such sale or for such adjourned sale or sales; and without further notice or publication, it may make such sale at the time and place to which the same shall be so adjourned."

5. Your Receivers have not now, nor by borrowings or otherwise prior to September 1, 1932, or within any time that can now be foreseen in the near future will they be able to procure, a sufficient amount of funds with which to pay the principal amount and interest of such Notes so falling due September 1, 1932.

6. In the brief time which has elapsed since the appointment of your Receivers they have not been able to investigate the facts as to the issuance of said Notes and the pledged security, nor any other phase of the above situation sufficiently to have any well-informed opinion as to, or to aid the Court in passing upon or instructing your Receivers how to act with reference to, the rights of Bankers Trust Company as such Trustee, the holders of the Thirty-one million six hundred seventy-two thou-

sand one hundred Dollars ($31,672,100) principal amount of said Ten-Year Convertible 7% Gold Notes, the defendant company, its other creditors and other persons interested in it, and your Receivers, with respect to or concerning such Fifty-four million Dollars ($54,000,000) principal amount of First and Refunding Mortgage 5% Gold Bonds.

Your Receivers require at least sixty days to make a full investigation of all the facts respecting the issuance of said Notes and the Bonds pledged to secure the same, for the purpose of making recommendations as to the action which should or might be taken with respect to said Notes.

WHEREFORE, your petitioner prays that this Honorable Court take under advisement the action to be taken by the Receivers with respect to the aforesaid matters until the Receivers have had an opportunity to make a full investigation of all of the foregoing matters so as to make recommendations to the Court with respect thereto; and for such other and further relief in the premises as the Court may deem proper, just and reasonable.

Dated, New York, N. Y., September 1st, 1932.

THOMAS E. MURRAY, JR.,
Receiver as aforesaid.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Receivers.

Doc. 20

## Petition for Order Granting Leave to Intervene to Committee for Manhattan Railway Company Consolidated Mortgage Gold Four Per Cent. Bonds.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

815

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| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

*To the Judges of the District Court of the United States for the Southern District of New York:*

The petition of Van Santvoord Merle-Smith, Walter Bennett, Philip A. Benson, Fred J. Fuller and James Lee
816 Loomis, as the Protective Committee acting for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, due April 1, 1990 (hereinafter called the "Bonds"), on behalf of themselves and on behalf of all other holders of such Bonds who may deposit their Bonds with the Protective Committee, respectfully shows as follows:

(1) The Protective Committee has been formed for the purpose of protecting the interests of all holders of the Bonds who shall deposit their Bonds with the Protective Committee.

(2) The undersigned members of the Protective Committee themselves represent a large amount of the Bonds, and other holders of large amounts of the Bonds have agreed with the Protective Committee to deposit their Bonds with the designated Depositary of the Protective Committee. The Protective Committee has called for the deposit of Bonds and a published notice to that effect will shortly appear.

(3) On August 26, 1932, in a suit in equity brought by one of the creditors of the Interborough Rapid Transit Company, Presiding Judge Martin T. Manton of the United States Circuit Court of Appeals, sitting as a District Judge in this Court, appointed as Temporary Receivers of Interborough Rapid Transit Company and its property the Honorable Victor J. Dowling and Mr. Thomas E. Murray, Jr.

(4) That on or about September 2, 1932, Manhattan Railway Company filed its petition before this Court in the above-entitled cause, praying that said Manhattan Railway Company should be made a party defendant in this cause and that the receivership in this cause be extended so as expressly to embrace the interests of Manhattan Railway Company in the property in the possession of the said Temporary Receivers Victor J. Dowling and Thomas E. Murray, Jr.

(5) Your petitioners are informed and believe that numerous questions of great importance vitally affecting the interests of the Bonds represented by the Protective Committee will be raised in the above-entitled cause and will come before this Court for its decision thereon. Your petitioners refer to the bill of complaint herein of the American Brake Shoe and Foundry Company, plaintiff, and to the petition herein of Manhattan Railway Company, wherein the facts with regard to certain of these matters are set forth at length.

(6) Your petitioners, as such Protective Committee, allege that, in view of the importance to the Bonds which they represent of the questions which will arise from time to time in this cause, they should be permitted to intervene in this cause.

WHEREFORE, your petitioners pray that an order be entered herein permitting your petitioners, as the Protective Committee acting for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, to intervene as a party defendant in this cause with the right to plead on behalf of the holders of the Bonds and to be heard on all matters arising in this cause, and that your petitioners be entitled to notice of all proceedings herein and that your petitioners have such other and further relief as to this Court may seem just and proper.

Dated, New York, N. Y., September 6, 1932.

VAN SANTVOORD MERLE-SMITH,
WALTER BENNETT,
PHILIP A. BENSON,
FRED J. FULLER,
JAMES LEE LOOMIS,
as the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds,

By VAN SANTVOORD MERLE-SMITH.

COTTON, FRANKLIN, WRIGHT & GORDON,
Solicitors for Committee,

BOYKIN C. WRIGHT, of Counsel.

Doc. 21

**Manhattan Railway Company Receivership—Affidavit Showing Action of and Approval by Manhattan Board of Directors.**

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

In Equity
No. E 70-364

In the Matter of the Petition
of
MANHATTAN RAILWAY COMPANY.

SOUTHERN DISTRICT OF NEW YORK,
COUNTY OF NEW YORK,
STATE OF NEW YORK, } ss.:

CHARLES G. MULLIN, being duly sworn, deposes and says that he is Secretary of Manhattan Railway Company, and in such capacity has charge and custody of the corporate books and records of the said company, including the minute book thereof.

That of his own knowledge, and from the said minute book of the said Manhattan Railway Company your deponent knows that there was held, on the 2nd day of September, 1932, at 10.30 o'clock in the forenoon of that day, at the office of Manhattan Railway Company at No.

165 Broadway, a special meeting of the Board of Directors of the said company, upon such due and proper notice to each and every of the directors of the said company as is provided in the by-laws thereof. That there was present at the said meeting a quorum of the directors of the said Manhattan Railway Company, and that the following resolutions were thereat adopted by the said Board of Directors:

"RESOLVED, in view of the appointment of the receivers of the Interborough Rapid Transit Company, who have taken possession of all the operating properties of this company, this company present its petition to the United States District Court for the Southern District of New York in the cause pending in that court, in which the American Brake Shoe and Foundry Company is plaintiff and Interborough Rapid Transit Company is defendant, to have this company made a party defendant to said suit for the protection of its interests and those of its creditors, and to have the receivership under the Bill of Complaint in that cause extended so as to embrace and include all the properties of this company, and that this company submit itself and its properties to the jurisdiction of the court in which said suit is pending; and

RESOLVED FURTHER, that the officers of this company be, and they hereby are authorized and directed to cause such a petition to be prepared and presented to the said court, to employ such counsel as in their judgment may be necessary for such purpose, to take any and all necessary steps and proceedings and do any and all acts deemed by them necessary or advisable, that this company may be made a party defendant in such suit and that such receivership may be extended so as to embrace all the property of this company."

That further your deponent knows of his own knowledge, and from the said minute book of the said Manhattan Railway Company, that there was held, on the 6th day of September, 1932, at 11.15 o'clock in the forenoon of that day, at the office of Manhattan Railway Company at No. 165 Broadway, a special meeting of the Board of Directors of the said company, upon such due and proper notice to each and every of the directors of the said company as is provided in the by-laws thereof. That there was present at the said meeting a quorum of the directors of the said Manhattan Railway Company, and that the following resolutions were thereat adopted by the said Board of Directors.

> "RESOLVED, that the resolution adopted by this Board at its meeting held on September 2, 1932, for the purpose of having this company made a party defendant in the suit in which the receivers of the Interborough Rapid Transit Company were appointed, and of extending the receivership to the properties of this company, be and the same hereby is in all respects approved, ratified and confirmed, and it is
>
> FURTHER RESOLVED, that any and all acts of the officers of this company taken under and by virtue of said resolution be, and the same hereby are in all respects approved, ratified and confirmed."

(Sd.) CHARLES G. MULLIN.

Sworn to before me this
8th day of September, 1932.

(Sd.) SPENCER A. STUDWELL,
Notary Public,
Westchester Co.
N. Y. Co. Clk's No. 1473, Reg. 3S-931.
Term expires Mar. 30, 1933.

(Seal)

Doc. 22

## Receivers' Application No. 3—September 8, 1932.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70 364 RECEIVERS' PETITION. |

*To the Honorable Judges of the District Court of the United States for the Southern District of New York:*

The petition of Victor J. Dowling and Thomas E. Murray, Jr., Receivers herein of Interborough Rapid Transit Company, upon information and belief respectfully shows to this Court as follows:

1. That in the administration of this estate numerous proceedings will be necessary, involving the filing of many papers and documents.

2. That in order that your Receivers may be able to maintain an orderly and careful record of all proceedings in this cause and of all documents and papers to be filed in connection with the administration of the estate, your petitioners desire to number the various Receivers' petitions and orders which may be entered by this Court and

any other documents or papers which may be filed herein, and to refer in any subsequent papers or documents to such previous papers by the numbers contained on such documents and papers.

WHEREFORE, your petitioners pray that an order be made by this Court authorizing and permitting the Receivers to number the various documents and papers filed in this cause, and any parties in these proceedings may refer to such documents and papers by the numbers contained thereon.

Dated, New York, N. Y., September 8th, 1932.

VICTOR J. DOWLING,
THOMAS E. MURRAY, JR.,
Receivers of Interborough Rapid Transit Company.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for said Receivers,
Office and P. O. Address:
No. 25 Broadway,
Borough of Manhattan,
New York, N. Y.

WM. WALLACE, of Counsel.

Doc. 22

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 NOTICE AND WAIVER OF CONSENT. |

839

We hereby waive notice of the within petition and consent to the granting and entering of the attached order.

Dated, New York, N. Y., September 9, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

JAMES L. QUACKENBUSH,
Attorney for Defendant.

840

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes.

*American Brake Shoe Record.*
*Consent to Granting Application.*

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds.

ROOT, CLARK & BUCKNER,
Attorneys for the Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company.

COTTON, FRANKLIN, WRIGHT & GORDON,
Attorneys for the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for the Receiver of Manhattan Railway Company.

## Receivers' Application No. 4—September 8, 1932.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 RECEIVERS' PETITION. |

*To the Honorable Judges of the District Court of the United States for the Southern District of New York:*

The petition of Victor J. Dowling and Thomas E. Murray, Jr., Receivers herein of Interborough Rapid Transit Company, upon information and belief respectfully shows to this Court as follows:

1. That in the administration of this estate numerous proceedings will be necessary, involving records of considerable length and detail.

2. That in order that your Receivers may be able to maintain an orderly and careful record of all proceedings in this cause and of all documents and papers arising in the administration of the estate, your petitioners desire to cause to be printed all such records filed in said proceedings and any further documents and papers which your Receivers in their discretion desire to have so printed.

WHEREFORE, your petitioners pray that an order be made by this Court authorizing the Receivers to maintain a printed record of all documents arising in the proceedings in this cause and of any further documents and papers which your Receivers in their discretion desire to have so printed.

Dated, New York, N. Y., September 8th, 1932.

VICTOR J. DOWLING,
THOMAS E. MURRAY, JR.,
Receivers of Interborough Rapid Transit Company.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for said Receivers,
Office and P. O. Address:
No. 25 Broadway,
Borough of Manhattan,
New York, N. Y.

WM. WALLACE, of Counsel.

Doc. 23

IN THE

## UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 WAIVER OF NOTICE AND CONSENT. |

We hereby waive notice of the within petition and consent to the granting and entering of the attached order.

Dated, New York, N. Y., September 9, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

JAMES L. QUACKENBUSH,
Attorney for Defendant.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes.

*American Brake Shoe Record.*
*Consent to Granting Application.*

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds.

ROOT, CLARK & BUCKNER,
Attorneys for the Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company.

COTTON, FRANKLIN, WRIGHT & GORDON,
Attorneys for the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for the Receiver of Manhattan Railway Company.

Doc. 24

## Receivers' Application No. 5—September 8, 1932.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 RECEIVERS' PETITION. |

*To the Honorable Judges of the District Court of the United States for the Southern District of New York:*

The petition of Victor J. Dowling and Thomas E. Murray, Jr., Receivers herein of Interborough Rapid Transit Company, upon information and belief respectfully shows to this Court as follows:

1. That the appointment of your petitioners as Receivers of Interborough Rapid Transit Company, defendant herein, has necessarily left it without any cash resources with which to pay the ordinary and necessary current expenses for the registration and transfer of its outstanding shares of stock.

2. That your petitioners are of the opinion that it is desirable that the Receivers herein be authorized to pay, out of funds coming into their hands as Receivers, such expenses.

*American Brake Shoe Record.*
*Receivers' Application No. 5.*

WHEREFORE, your petitioners pray for an order authorizing said Receivers to pay, out of funds coming into their hands as such Receivers, all expenses necessary or proper to provide for the registration and transfer of the outstanding shares of stock of Interborough Rapid Transit Company.

Dated, New York, N. Y., September 8th, 1932.

VICTOR J. DOWLING,
THOMAS E. MURRAY, JR.,
Receivers of Interborough Rapid Transit Company.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for said Receivers,
Office and P. O. Address:
No. 25 Broadway,
Borough of Manhattan,
New York, N. Y.

WM. WALLACE, of Counsel.

Doc. 24

IN THE

## UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, | In Equity E 70-364 |
| 863 against | WAIVER OF NOTICE AND CONSENT. |
| INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | |

We hereby waive notice of the within petition and consent to the granting and entering of the attached order.

Dated, New York, N. Y., September 9, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

JAMES L. QUACKENBUSH,
Attorney for Defendant.
864

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes.

*American Brake Shoe Record.*
*Consent to Granting Application.*

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds.

ROOT, CLARK & BUCKNER,
Attorneys for the Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company.

COTTON, FRANKLIN, WRIGHT & GORDON,
Attorneys for the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for the Receiver of Manhattan Railway Company.

Doc. 25a

## Receivers' Application No. 6, September 8, 1932, as to Postponement of Payment of State Franchise Tax.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, | In Equity E 70-364 |
| against | RECEIVERS' PETITION. |
| INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | |

869

*To the Honorable Judges of the District Court of the United States for the Southern District of New York:*

The petition of Victor J. Dowling and Thomas E. Murray, Jr., Receivers herein for Interborough Rapid Transit Company, upon information and belief respectfully shows to this Court as follows:

870

1. That your petitioners are in receipt from the Department of Taxation and Finance for the State of New York of a Notice of Assessment and Receipt, dated August 25, 1932, calling for the payment of $331,097.96, being the state franchise tax under section 185 of the New York State tax law, based upon the gross earnings of Interborough for the year ended June 30, 1932.

Your petitioners are advised that the amount of this tax is based upon the report filed by Interborough Rapid

Transit Company, and is divided between subway and elevated divisions as follows:

| | |
|---|---|
| Manhattan Elevated Divisions.... | $ 81,136.60 |
| Subway Divisions..... | 249,961.36 |

2. The penalty for non-payment of such tax amounts to five per cent of the tax due and unpaid, plus interest at the rate of one per cent per month during the period in which such tax remains unpaid.

3. Your petitioners have not had sufficient time to investigate the question of the legality of such franchise tax, the correctness of the amount, or the problem as to whether such matured and unpaid franchise tax and penalties, if any, which may result because of such non-payment, have any priority with respect to the assets of the receivership estate.

WHEREFORE, your petitioners pray that an order be entered in this court authorizing and directing your petitioners not to pay such franchise tax until such time as this court shall otherwise direct.

Dated, New York, N. Y., September 8, 1932.

VICTOR J. DOWLING,
THOMAS E. MURRAY, JR.,
Receivers of Interborough Rapid Transit Company.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for the Receivers of
Interborough Rapid Transit Company.

WM. WALLACE, of Counsel.

874 *American Brake Shoe Record.*
*Waiver and Consent.*

Doc. 25

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, | In Equity E 70-364 |
| 875 against | WAIVER OF NOTICE AND CONSENT. |
| INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | |

We hereby waive notice of the within petition and consent to the granting and entering of the attached order.

Dated, New York, N. Y., September 9, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

JAMES L. QUACKENBUSH,
Attorney for Defendant.
876

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes.

*American Brake Shoe Record.*
*Waiver and Consent.*

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds.

ROOT, CLARK & BUCKNER,
Attorneys for the Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company.

Attorneys for the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds.

Attorneys for the Receiver of Manhattan Railway Company.

**Application No. 1 of Receiver of Manhattan Railway Company as to Appointment of Counsel.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, | |
| 881 against | |
| INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |
| IN THE MATTER OF THE PETITION OF MANHATTAN RAILWAY COMPANY. | |

*To the Honorable Martin T. Manton, United States Circuit Judge designated to hold a term of the District Court of the Southern District of New York:*

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Now comes William Roberts and respectfully represents as follows:

By an order dated September 6, 1932, your petitioner was duly appointed Receiver of the above named Manhattan Railway Company and of all its property and assets. Your petitioner has duly filed his bond for the faithful performance of his duties and as such Receiver in the principal amount required by said order and thereupon duly qualified as such Receiver.

*American Brake Shoe Record.*
*Manhattan Receiver's Application No. 1.*

Your petitioner is of the opinion that it is imperative that he be permitted to employ counsel to represent him in the discharge of his duties as Receiver.

Your petitioner suggests that Messrs. Hughes, Schurman & Dwight, of 100 Broadway, City of New York, be appointed as such counsel and states that this suggestion is not made at the instance or request of any person other than petitioner.

Your petitioner deems Messrs. Hughes, Schurman & Dwight competent and qualified to represent him as such Receiver.

WHEREFORE, your petitioner prays that an order be entered herein granting leave to your petitioner to employ counsel for him as said Receiver in this Court and suggests that Messrs. Hughes, Schurman & Dwight, of 100 Broadway, Borough of Manhattan, City of New York, be appointed such counsel.

WILLIAM ROBERTS.

Sworn to before me this
6th day of September, 1932.

JAMES D. MCCAULEY,
Notary Public, Queens County.
(Seal) Certificate filed in New York County.
Commission expires March 30, 1933.
Queens County Clerk's No. 2548, Reg. No. 7579.
New York County Clerk's No. 273, Reg. No. 3Mc179.
Kings County Clerk's No. 27, Reg. No. 3088.
Bronx County Clerk's No. 15, Reg. No. 42Mc33.

Doc. 27

## Affidavit by Counsel for Receiver of Manhattan Railway Company.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |
| IN THE MATTER OF THE PETITION OF MANHATTAN RAILWAY COMPANY. | |

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

RICHARD E. DWIGHT, being duly sworn, deposes and says:

I am an attorney at law, duly admitted to practice in the United States District Court for the Southern District of New York, and since the year 1906 have been a member of the firm of Hughes, Schurman & Dwight and its predecessor firms.

Neither I nor my firm, to the best of my knowledge, have had during the period of one year prior to the date of this affidavit any business, professional or other con-

nections with the subject-matter of this suit, with the parties or any creditor of the defendant Interborough Rapid Transit Company, or the defendant Manhattan Railway Company, or any other persons interested in the cause or in the receivership estate.

My firm frequently has acted as attorneys for both bankrupt and equity receivers in this court, and is acquainted with the principles and practices likely to be involved in this cause.

I know of no reason why I or my firm should not act as attorneys for the Receiver in this matter.

RICHARD E. DWIGHT.

Sworn to before me this
6th day of September, 1932.

JAMES D. MCCAULEY,
Notary Public,
(Seal) Queens County Clerk's No. 2548, Reg. No. 7579.
New York County Clerk's No. 273, Reg. No. 3Mc179.
Kings Co. Clerk's No. 27, Reg. No. 3088.
Bronx Co. Clerk's No. 15, Reg. No. 42Mc33.
Commission expires March 30, 1933.

# Petition of Central Hanover Bank and Trust Company for Leave to Intervene.

IN THE

## UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity No. 70-364 |

PETITION OF CENTRAL HANOVER BANK AND TRUST COMPANY, AS TRUSTEE UNDER CONSOLIDATED MORTGAGE OF MANHATTAN RAILWAY COMPANY, FOR LEAVE TO INTERVENE AND BE MADE A PARTY.

*To the Honorable the Judges of the District Court of the United States for the Southern District of New York, in equity sitting:*

Now comes Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage hereinafter mentioned, and respectfully shows:

1. Your petitioner is a corporation organized and existing under the laws of the State of New York, and it is the Trustee under a certain Consolidated Mortgage duly made by Manhattan Railway Company dated February

26, 1890, as supplemented by a certain indenture supplemental thereto duly made by said Manhattan Railway Company under date of June 13, 1899 (said Consolidated Mortgage, as supplemented by said supplemental indenture, being hereinafter termed the Consolidated Mortgage). Under said Consolidated Mortgage there have been duly authenticated by the Trustee $40,676,000 in principal amount of Consolidated Mortgage Gold Bonds (hereinafter termed bonds) due April 1, 1990, with interest at the rate of 4% per annum, payable semi-annually on October 1st and April 1st in each year, in the form provided for in said Consolidated Mortgage, all of which said bonds have been duly executed and issued by Manhattan Railway Company, and ever since have been and are now outstanding in the hands of bona fide holders thereof for value and secured by the aforesaid Consolidated Mortgage. In addition there are held by petitioner $7,000 in principal amount of said bonds for delivery in exchange for a like amount of outstanding Registered Bond Certificates of Manhattan Railway Company, as provided in said Consolidated Mortgage.

2. Default exists under said Consolidated Mortgage in that there have not been paid certain taxes, aggregating upwards of $780,000, which have been imposed against property of Manhattan Railway Company covered by said Consolidated Mortgage and have for some time past been due and payable; and by virtue of said default this petitioner is now entitled to take proceedings to enforce its rights under said Consolidated Mortgage in respect of the property, and the tolls, income, rents, issues and profits thereof, which are specifically pledged to your petitioner by said Consolidated Mortgage.

3. Substantially all of the property of said Manhattan Railway Company constituting the security for said Consolidated Mortgage was leased by Manhattan Railway Company to Interborough Rapid Transit Company by

lease dated January 1, 1903, for the term of 999 years from November 1, 1875, and is in the possession of this Court herein by Victor J. Dowling and Thomas E. Murray, Jr., as temporary Receivers appointed in the above-entitled cause by order dated August 26, 1932; and under date of September 6, 1932, this Court made an order herein extending said receivership to all of the property of Manhattan Railway Company, subject to the provisions of said order of September 6, 1932, and appointing William Roberts as temporary Receiver of the property of said Manhattan Railway Company. To the bill of complaint in the above-entitled cause, dated and filed herein on or about August 26, 1932, the order appointing said Interborough Receivers, dated and filed herein August 26, 1932, the petition of Manhattan Railway Company dated and filed herein on September 2, 1932, asking that it be made a party defendant, and for other relief, and said order dated and filed herein on September 6, 1932, this petitioner prays reference with the same force and effect as if herein set forth in full.

4. Under the aforesaid lease, Interborough Rapid Transit Company agreed to pay taxes of the nature aforesaid, as well as to pay the interest on the bonds secured by said Consolidated Mortgage and to make the other payments in said lease provided for. By the bill of complaint herein it is alleged, and by the answer of Interborough herein it is admitted, that Interborough has failed to pay certain taxes for 1932 duly assessed by the City of New York against the special franchises and real estate belonging to Manhattan, the amount of such unpaid taxes with interest then due being in excess of $860,000, and that such failure constitutes a default on the part of Interborough under said lease from Manhattan.

5. In and by Article Ninth of said Consolidated Mortgage, it is provided as follows:

> "NINTH: That so long as any of the bonds hereby secured shall be outstanding and unpaid, the Manhattan Company or its successor shall, at its own expense, maintain an office or agency in the City of New York for the payment of the interest coupons of said bonds, and the principal thereof at maturity, and for the registering of the principal of said bonds, as therein provided, at which office proper books shall be kept for such registry. Until the interest and principal of said bonds shall be fully paid, said Railway Companies, their successor and successors, shall promptly pay all taxes, assessments or other like charges lawfully laid, charged or imposed upon the mortgaged premises or any part thereof, including the property represented by any stocks, bonds or other like muniments or evidence of ownership deposited with or held by the Trustee as aforesaid, which may become prior to the lien of these presents; and that upon default by the said Railway Companies, or either of them, to pay any taxes, assessments or other like charges assessed or laid upon them, or either of them, or upon their property, whereby the lien of these presents might become impaired, the Trustee may, if so advised, and without impairment of or prejudice to any of its rights under this mortgage by reason of such default, itself pay the said taxes, assessments or other like charges, and have a lien upon the mortgaged premises for its advances for that purpose."

The original or a true copy of said Consolidated Mortgage will be produced upon the hearing hereof and filed herewith, if so directed by this Court.

6. During the course of said Interborough receivership and/or said Manhattan receivership, many questions will arise in respect of which this petitioner is entitled to adequate notice and the right to be heard, including such questions as the curing of the existing default under said lease, which constitutes also a default under the Consolidated Mortgage, the making of future payments under said lease, the failure to make some of which payments would result in default under the Consolidated Mortgage, the application of income coming into the hands of said Interborough Receivers and/or said Manhattan Receiver, and the preservation, operation and disposition of the property in the possession of this Court herein covered by said Consolidated Mortgage. For the reasons aforesaid, this petitioner has a vital interest in this litigation.

WHEREFORE, this petitioner prays for an order permitting it to intervene herein and making it a party hereto, and that petitioner may have such other and further relief as may be just and proper.

Dated: September 16th, 1932.

CENTRAL HANOVER BANK AND TRUST COMPANY,
By F. J. FULLER,
Vice-President.

Attest:

E. D. LA RUE,
Assistant Secretary.

DAVIES, AUERBACH & CORNELL,
Solicitors for Petitioner.

EDWARD CORNELL,
H. C. MCCOLLOM,
of Counsel.

Doc. 31.

## Affidavit of Publication of Notice to Creditors.

IN THE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity No. E. 70-364. AFFIDAVIT. |

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.:
BOROUGH OF MANHATTAN,

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK—THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. In Equity E 70-364.

*To the Creditors of Interborough Rapid Transit Company:*

PLEASE TAKE NOTICE that a hearing will be held on September 22, 1932, at Room 439 in the Old Post Office Building, Borough of Manhattan, City of New York, at 10.30 o'clock in the forenoon, why the receivership of the Interborough Rapid Transit Company should not be continued during the pendency of the above entitled suit, and that upon the hearing of said order to show cause

any creditor of Interborough Rapid Transit Company or other party in interest may be heard.

Dated, New York, September 8, 1932.

VICTOR J. DOWLING and
THOMAS E. MURRAY, JR.,
Receivers of Interborough Rapid Transit Company.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Receivers of
Interborough Rapid Transit Company.

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THOMAS J. NESTOR, being duly sworn, says that he is the Principal Clerk of the Publisher of the New York Evening Post, a daily newspaper printed and published in the City and County of New York, Borough of Manhattan; that the advertisement hereto annexed has been regularly published in the said "New York Evening Post" on the 13th day of September, 1932.

(Signed) THOMAS J. NESTOR.

Sworn to before me this
14th day of September, 1932.

(Signed) GEORGE TOBIN,
Notary Public, Kings County.
Co. Clerk's No. 72, Reg. No. 4073.
Certificate filed in N. Y. County Co. Clerk's No. 140, Reg. No. 4188.
Commission expires March 30, 1934.

(Notarial Seal)

Doc. 32

## Amended and Substituted Petition for Intervention by Harold Palmer and Others as Protective Committee for Holders of Seven Per Cent. Guaranteed Stock of Manhattan Railway Company (and Cross-Petition).

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

With leave of the Court, the petitioners, Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, as the Protective Committee, acting for the holders of Seven Per Cent. Guaranteed Stock of Manhattan Railway Company, which stock will be hereinafter more fully described, amend their petition for intervention, dated September 8th, 1932, by striking therefrom the "First," "Second," "Third," "Fourth," "Fifth" and "Sixth" paragraphs thereof, and by substituting therefor the following paragraphs:

FIRST: 1. Your petitioners own over four thousand shares of the Common Stock of Manhattan Railway Company either beneficially or as fiduciaries for others, practically all of such holdings having been so owned and held by them for a number of years prior to institution of the proceedings in this cause.

16 *American Brake Shoe Record.*
*Amended Petition of 7% Guaranteed Stock Prot. Com.*

2. Your petitioners are acting as the Protective Committee for holders of the Seven Per Cent. Guaranteed Stock of Manhattan Railway Company under a Deposit Agreement executed by your petitioners on August 26th and 27th, 1932, a copy of which said Protective Agreement is attached hereto as Exhibit "1." In addition to the stock owned by your petitioners as hereinabove set forth, your petitioners, as such Protective Committee, hold through The Commercial National Bank and Trust Company, the Depositary under said Protective Agreement, substantial amounts of such stock in addition to such as has already
917 been deposited by members of the Committee; and your petitioners further have, through others, received trustworthy commitments by holders of such stock that they will deposit under said agreement shares of additional amounts beyond the shares above mentioned which aggregate between thirty-five hundred and four thousand in number. Further, your petitioners are in communication with various holders of such stock other than any of the stock mentioned above, and expect a substantial number of additional shares of stock to be deposited by them under said agreement within a few days.

3. A substantial amount of the stock which has been deposited, or as to which your Committee has such commitments of deposit, has been held by the present owners
918 thereof since prior to the year 1903.

4. Your petitioners as such Committee represent the actual interests of the holders of Seven Per Cent. Guaranteed Stock and represent no other interest whatever. The said Committee has not been organized and is not acting at the instance of, nor is it directly or indirectly allied with or influenced, nor is it acting under the influence of any banking or financial group, nor any interest representing either securities of the Interborough Rapid Transit Company or any group planning or financially interested in a plan for reorganization or unification of

any of the rapid transit facilities of Greater New York. The Protective Committee of your petitioners has been organized for the sole purpose of protecting the bona fide interest of the holders of said Seven Per Cent. Guaranteed Stock as such; and one of its reasons, among others, for presenting this petition is to forestall the filing of an intervening petition by stockholders who might preempt the right in this cause to represent the said Seven Per Cent. Guaranteed Stock and may purportedly be acting in its interest, but who may on the contrary work without reference to or against its interest either through making an unfair use of their position, or through actually representing or unduly favoring or combining with interests antagonistic to the rights of the said Seven Per Cent. Guaranteed Stock.

SECOND: The primary purpose of this petition in intervention is to enable your petitioners as such Protective Committee to protect the said Seven Per Cent. Guaranteed stockholders from a threatened destruction of their rights as presently set forth, through any undertaking on the part of the defendant herein, Interborough Rapid Transit Company, to disaffirm and render inoperative a certain indenture of January 1, 1903, between the Manhattan Railway Company, hereinafter called Manhattan, as lessor, and Interborough Rapid Transit Company, hereinafter called Interborough, as lessee, whereby the Manhattan leased its properties to Interborough for a period of 999 years from November 1, 1875. Your petitioners believe and state upon the basis of facts which will be presently set forth that the holders of said Seven Per Cent. Guaranteed Stock constitute the only group which has an unqualified interest in maintaining and protecting the integrity and continuance of the said Manhattan lease; that there is no adequate way by which your petitioners can be informed of proceedings in this cause or can adequately protect their said rights, unless they be permitted to inter-

vene in this cause as parties in order that they may have proper notice and opportunity under all circumstances to protect the said stock from disaffirmance of said lease and a destruction of their legal and equitable rights thereunder.

THIRD: That under the said 999-year lease by Manhattan to Interborough of January 1, 1903, which said lease your petitioners will ask leave to introduce as Exhibit "2" with this petition, unless the same has been or is to be by the Court's order otherwise introduced into the record of this cause, the cash rental to be annually paid to the Manhattan was the sum of Ten Thousand Dollars ($10,000) only, which said sum constituted about one-one-hundredth of one per cent. of the capital cost of the Manhattan properties; that under the said "lease" the Interborough undertook, in addition to the payment of said cash rental, under article ninth thereof, to maintain the properties and to keep them insured and to deliver them at the termination of the "lease" in as good condition as received, or in equivalent condition or value; and in article eleventh to pay and discharge as rental under the said "lease" any and all taxes, assessments, license fees, etc.; under article sixth, which will be presently set forth at length, to pay as rental to the owners of the six hundred thousand (600,000) shares of stock of Manhattan after January 1, 1906, an amount annually equal to seven per cent. (7%) upon the par value of each share, which said par value was and is One Hundred Dollars ($100); and under article seventh to pay as rentals under said "lease" the interest upon all bonds then outstanding against the Manhattan properties.

That under the terms of the said "lease" the Manhattan Railway Company was and is not a real party in interest, excepting to a negligible extent. The complete and entire consideration which Interborough was to pay in the way of rental and is now obligated to pay in the way of rental

is not to the Manhattan Railway Company, but that the true parties in interest under the said "lease" so long as it remains operative, are and continue to be, excepting as will presently be shown, the holders of the capital stock of Manhattan to whom, under the terms of the said "lease," the actual rental was to be and is now being paid by Interborough; that the function of Manhattan under said "lease" is not the function of a corporation owning and operating, or receiving consideration for use of, its properties, but is the mere function of an empty shell for continuing its own legal existence against a possible termination of the "lease" and a safeguarding of its reversionary rights in case of such termination, and that as will be now set forth in the following paragraphs of this petition, the rights of your petitioners to receive full payment of seven per cent. on their said Guaranteed Stock is not a derivative right through the Manhattan Railway Company, but is a contract right according to the terms of the said "lease," and according to the interpretation placed thereon by the Courts of the State of New York; that your petitioners' prayer for leave to intervene in these proceedings, claiming an interest in the litigation as a party therein under the terms of Equity Rule No. 37, is for the purpose of enabling your petitioners on behalf of said Seven Per Cent. Guaranteed Stock to assert not the rights in equity of the Manhattan Railway Company under said "lease," but to assert their own direct right against the Interborough and its receivers under said lease.

FOURTH: 1. That under said Manhattan-Interborough "lease" in article seventh, Interborough assumed and covenanted to pay, as rent, the interest (1) on all then outstanding debenture bonds of the New York Elevated Railroad Company then merged with Manhattan, amounting to One Million Dollars ($1,000,000); (2) on the first mortgage bonds of Metropolitan Elevated Railroad Company then merged with Manhattan of Ten Million Eight Hun-

dred and Eighteen Thousand Dollars ($10,818,000); (3) on the Consolidated Mortgage Four Per Cent. Bonds of Manhattan of which there were then outstanding bonds in principal amount of Twenty-eight Million Sixty-five Thousand Dollars ($28,065,000); (4) on all bonds which might thereafter be issued by Manhattan in extension or substitution of, or for the purpose of retiring any of said outstanding bonds; (5) on all bonds of Manhattan which might thereafter be issued under the said Consolidated Mortgage, and (6) on all bonds of Manhattan which might thereafter be issued. And the Interborough further covenanted to keep Manhattan "safe and harmless at all times from all claims and demands against it for interest arising from or under the said bonds or any of them" and covenanted further that "payments of any of such interest by the lessee (Interborough) to the Bondholders of the lessor (Manhattan) shall constitute payment of rent, in compliance with the foregoing covenants to pay the same to the lessor."

2. That there are now outstanding against Manhattan's properties mortgage obligations of Manhattan aggregating in amount, as your petitioners are informed and believe, about $45,206,000, said obligations consisting of $40,683,000 in principal amount of Consolidated Mortgage Four Per Cent. Bonds, and $4,523,000 in principal amount of Second Mortgage Four Per Cent. Bonds; that the properties of Manhattan represent, as your petitioners are informed and believe, an actual value safely in excess of the principal amount of funded indebtedness of Manhattan, so that in case of a cancellation or disaffirmance of the said "lease," the said outstanding mortgage debt would, in any event, as your petitioners are informed and believe, be adequately secured; that the holders of bonds under said mortgages have, therefore, as your petitioners believe, only a secondary interest in the maintenance of the said "lease," whereas your petitioners are wholly dependent for the

recognition of any claim whatsoever against the Interborough or its receivers, of their contractual claim for the said Seven Per Cent. dividend upon their stock, upon the continuance and integrity of the said indenture of "lease" of January 1, 1903.

3. That a certain Protective Committee consisting of Van Santvoord Merle-Smith and others acting as a Protective Committee in behalf of the Manhattan's said Consolidated Mortgage Four Per Cent. Bonds, presented to this Court on September 6, 1932, in this cause, their petition for intervention, and that this Court thereupon, without any consent by the parties then in the proceeding having been recorded in this cause, entered an order permitting said Protective Committee to intervene and to be made a party in this cause; that the said petition of said Protective Committee is hereby referred to and may be treated as an exhibit hereto; that it does not show why, if at all, the rights of the said petitioners and of those whom they represent should not be represented in this proceeding by the Trustee under said mortgage to which, as your petitioners are informed and believe, the interest has been regularly paid by the Interborough, according to the terms of said "lease" and by it distributed to the holders of bonds under said mortgage.

FIFTH: 1. That in the said Manhattan-Interborough "lease" it was provided as follows:

> "ARTICLE SIXTH: The Lessee hereby leases and hires from the Lessor the said railroad and railroads, franchises, rights, privileges, easements, real estate and property, hereinbefore mentioned, described and demised, for and during said term of nine hundred and ninety-nine years aforesaid, and upon the terms and conditions in this lease expressed, and the Lessee hereby covenants and agrees to pay to the Lessor and hereby guarantees to each

owner of record of shares of capital stock of the Lessor, dividends, as rent, as hereinafter provided, for the term of two years and nine months from the 31st day of March, 1903. The Lessor hereby covenants and agrees, that prior to the date of payment of each of the instalments of rent provided for in this article, it will declare a dividend equal to such instalment, payable upon the date of payment of such instalment, and after or simultaneously with such declaration of dividend, will close its transfer books of stock for a reasonable time prior to such
935 date of payment, and that such dividend shall be payable to the owner of record of its stock, who shall be such, on the date of closing of its transfer books aforesaid. The said dividend rentals payable to all such owners of record for each of the first two years and the remaining nine months comprised in said two years and nine months shall be an amount equal in the aggregate to the net earnings of the Lessor, for each of said three periods respectively, but shall not exceed seven per centum (7%) per annum upon the outstanding capital stock of the Lessor; and shall be not less than six per centum (6%) per annum upon such stock; said net earnings shall, among other things, include all interest earned by the Lessor, and shall be ascer-
936 tained by the system of accounting heretofore employed by the Lessor, and by deducting from the gross earnings, among other things, operating expenses, taxes accrued and proportionately chargeable to the period aforesaid, interest upon the bonds described or mentioned in ARTICLE SEVENTH of this Lease; repairs, replacements, expenses of litigation and all judgments recovered, except judgments recovered by owners or parties otherwise interested in property abutting upon the lines of railroad of the Lessor, for damages to said abutting property,

or the rental value thereof, arising from the construction, maintenance or operation of the said railroads and their interference with easements of light, air and access, and the expenses of the Lessor in litigations connected therewith.

Proper books of account according to the system of accounting heretofore employed by the Lessor shall be kept by the Lessee until January first, 1906, showing the gross earnings, and an itemized account of the proper and reasonable charges against the same, which shall at all times be open to the inspection of the officers and agents of the Lessor.

No reduction of the guaranteed annual dividend rental or in the term of years of this lease shall be made without the unanimous consent of the shareholders of record of the Lessor; provided, however, that nothing herein contained shall otherwise limit the lawful powers of the Board of Directors and shareholders of the Lessor to deal with the subject-matter of this lease and its provisions.

From and after the expiration of said two years and nine months, and from January first, 1906, the Lessee hereby covenants and agrees to pay to the Lessor, and guarantees to each owner of record of the shares of capital stock of the Lessor, as rent, an annual dividend of seven per centum (7%) on his holding of the capital stock of the Lessor.

The Lessee hereby covenants and agrees, that it will each and every year during the term hereby granted, beginning with the first day of April, 1903, pay to the Lessor as rent for the demised property, and hereby guarantees to the respective owners of record of the shares of the Lessor, the said annual dividends free of all charges, in quarter-yearly payments on the first days of January, April, July and October in each year, which after Janu-

ary 1st, 1906, shall be equal quarterly payments; the first of such payments to be made on the first day of July, 1903; and the Lessee will from time to time execute in proper form a guarantee to the above effect printed or engraved upon the certificates of stock of the Lessor; and as such stock certificates are surrendered for cancellation and issuance of new certificates in place thereof, will from time to time, upon request of the holder renew such guarantee upon all such new certificates.

The form of such Guarantee shall be as follows:

941 'Dividends amounting to six per cent. per annum and an additional amount, if earned, not exceeding one per cent. per annum, until January first, 1906, and after that date, dividends amounting to seven (7) per cent. per annum, upon the par value of the outstanding capital stock of the Manhattan Railway Company are guaranteed, and will be paid by the undersigned, in accordance with the terms and provisions of a certain Indenture made between the Manhattan Railway Company and the undersigned, dated the first day of January, 1903.

INTERBOROUGH RAPID TRANSIT COMPANY,
By

942 Treasurer.'

Payment of dividends as above provided by the Lessee to the stockholders of the Lessor shall constitute payment of rent, in compliance with the foregoing covenants to pay the same to the Lessor."

2. That pursuant to the undertaking in said article sixth hereinabove set forth the obligation of Interborough to the holders of such Seven Per Cent. Guaranteed Stock, is now so evidenced upon the face of each and every certificate of Seven Per Cent. Guaranteed Stock now held by

any of your petitioners or other holders thereof who have deposited the same under the said Protective Agreement of August 26, 1932.

SIXTH: 1. That the obligation of Interborough as set forth in said article sixth of said Manhattan-Interborough "lease" of January 1, 1903, and as set forth further in the said recital upon the face of each stock certificate, of Interborough's direct undertaking to each stockholder of Manhattan stock, originally applied to 600,000 shares of stock of the Manhattan Railway Company; that as to 556,490 shares of such stock, now known as "Manhattan Railway Modified Stock" the rights of holders have come 94
to be modified by direct contract between holders thereof and the Interborough; that said modification was effected in the years 1922 and 1923 under a certain Plan of Readjustment dated May 1, 1922, and amendments thereof, under which said Plan of Readjustment the said holders of said 556,490 shares of Seven Per Cent. Stock surrendered their direct rights against the Interborough under said "lease" to receive an annual payment of $7.00 per share, and accepted in lieu of such right the obligation of Interborough to pay to them certain amounts in dividends, but only if earned either by the combined properties of Manhattan and Interborough or through the operation alone of Manhattan by Interborough, or by Interborough alone.

945

2. That said holders of said 556,490 shares of Manhattan "modified stock," having thus surrendered all of their direct rights against Interborough under said "lease" have, as your petitioners believe, no real or genuine primary interest in maintaining the integrity or continued existence of the said "lease," and, as your petitioners believe, may well find it to the interest of the "modified stock" that the "lease" be disaffirmed and all rights thereunder destroyed so that the Manhattan prop-

erties may revert to the Manhattan Railway Company, and be operated by it for the vastly preponderant benefit of the "modified stock" which represents more than ninety per cent. of the "equity" in the Manhattan properties; that such probability of such preference on the part of the holders of "modified stock" for the disaffirmance and repudiation of the said "lease" is further augmented by the fact that whereas Interborough is at present restricted by law, as your petitioners believe and state, to a five-cent fare, the Manhattan is subject to no such restriction; and if said Manhattan-Interborough lease were abrogated,
947 Manhattan might come to operate its properties upon a more remunerative fare than five cents.

3. That for the foregoing reasons the "modified stock" would, prima facie in law, be able to dominate the policy which would be followed by Manhattan or its Receiver with reference to the disaffirmance or repudiation of said "lease," and their interests would probably move them to favor such disaffirmance and repudiation, an interest wholly antagonistic to the interest of your petitioners.

4. That after said plan of readjustment had been adopted modifying the rights of such stockholders as had assented thereto as aforesaid, the defendant Interborough undertook to refuse payment of the seven per cent. dividend to the stockholders of Manhattan who had not as-
948 sented to said plan, and who are herein referred to as Seven Per Cent. Guaranteed stockholders, upon the ground that the said indenture of lease of January 1, 1903, had been changed by the consummation of said plan; that under the terms of said "lease" it is provided in Article Sixth thereof, as hereinabove recited in paragraph "Fifth" of this petition that "no reduction of the guaranteed annual dividend rental or in the terms of years of this lease shall be made without the unanimous consent of the shareholders of record of the Lessor" (Manhattan); that in the case of *Peabody* v. *Interborough Rapid*

*Transit Company,* which was a suit by a holder of Manhattan Seven Per Cent. Guaranteed Stock directly against Interborough, it was held by the Supreme Court of New York County, in a decision reported in 209 New York Supplement, page 376, that the said original "lease" and the promise of the Interborough therein to pay to the holders of Seven Per cent. Guaranteed Stock, the sum of seven per cent. thereon annually continued in full force and effect; that said decision by the Supreme Court of New York County was thereafter affirmed by the Appellate Division, First Department of the said Supreme Court of the State of New York, by a majority of said Court in an opinion delivered by Presiding Justice Clarke, as reported in 209 New York Supplement, page 380, and that upon appeal to the Court of Appeals of the State of New York from the said decision of the said Appellate Division, the said decision of the Appellate Division was affirmed by the unanimous opinion of the Court consisting of Chief Justice Hiscock and Justices Cardozo, Pound, McLoughlin, Crane, Andrews and Lehman, as reported in 240 New York Reports, page 708.

5. That from the facts stated in the foregoing paragraphs it is certain as your petitioners believe and state that there is no party at present in this cause which has any real or primary interest to protect and safeguard the integrity and continuance of the said indenture of "lease" of January 1, 1903; that the Manhattan itself has no such primary interest, since it receives no real benefit therefrom; that the holders of bonds of Manhattan have no such real or primary interest since their obligations are, on information and belief, adequately secured by the Manhattan properties; and that the vastly predominant stockholder interest in Manhattan has no such interest in the protection of said "lease" but, on the contrary, upon information and belief, is probably antagonistic to the continuance thereof.

952 SEVENTH: That the courts of the State of New York have interpreted and construed the obligation of Interborough to holders of the Seven Per Cent. Guaranteed Stock of Manhattan as being a direct obligation from Interborough to each and all of the holders of such stock, an obligation upon which such holder may sue and recover against Interborough without impleading Manhattan; that such interpretation and construction of said obligation were established in the case of *Bowers v. Interborough Rapid Transit Company,* 201 New York Supplement, page 198, Supreme Court, Special Term (1923), in
953 which the Court delivered in part the following opinion, at page 204 of said volume:

> "For evident reasons the defendant here undertook an obligation, termed a guaranty, probably so termed for the appeal made by that word to the lay stockholder or investor, which is not a mere collateral engagement relating to dividends, but is an original obligation running to the persons holding the stock of the lessor. As such it is manifestly a promise which can be enforced by the persons to whom it runs in form as well as substance. See Pennsylvania Steel Co. v. New York City Railway, supra, 198 Fed. 749, 750, 117 C. C. A. 503, note. We can adopt the language found at page
954 27 of 112 N. Y. at page 496 of 19 N. E. (2 L. R. A. 648), of the report in the Beveridge Case, referred to above, and say that here the 'promise clearly was for the third person's benefit, and made with that distinct intention.'
>
> Indeed, defendant makes no argument that such an obligation running directly to the stockholders could not be availed of directly by them. It is intended to be for the benefit of the stockholders and to run to them. The agreement we have here is sufficient evidence in itself that the parties intended the 'guaranty' to be such that the stockholders could sue on it."

That the said decision was affirmed by the Appellate Division, First Department of said Supreme Court, by unanimous concurrence of the Justices sitting, as reported in 202 New York Supplement, page 917.

EIGHTH: 1. That the outstanding and crucial question which, as your petitioners are informed and believe, will arise in this cause is the question whether or not the receivers of the Interborough will undertake to disaffirm and repudiate the said Manhattan-Interborough indenture of lease of January 1, 1903; that the said lease, although highly profitable to Interborough through a course of more than eighteen years after execution thereof, has for various reasons come to be less profitable to Interborough and is at the present time claimed to be both inconvenient and unprofitable to Interborough; that during the past several years prior to this time there has been continual insistence by various financial interests associated with Interborough or with the ownership of securities of Interborough, that the said "lease" should be canceled and set at naught; that such insistence was signaled in the first instance by Interborough's attempt, as just set forth in Seventh hereof, to evade obligation to the holders of Seven Per Cent. Guaranteed Stock, which said attempt was, as there set forth, overruled by the courts of the State of New York; that since that time such insistence that Interborough be relieved of the obligations under said lease has been expressed in the public press by certain financial interests and by various publicists whose financial affiliations were not apparent, and that such public pressure exerted by such interests and from such sources for the abrogation of said lease has continued up to and including the present time; that the bill of complaint in this cause, in paragraph fifteenth thereof, recites, among other things, the obligations of Interborough under said lease as being obligations which Interborough is without financial resources to meet in full.

2. That in its answer in this cause, sworn to by the President of Interborough on August 25, 1932, consenting to the appointment of a receiver for Interborough, it admitted all of the allegations in said bill of complaint; that in Manhattan Railway Company's petition herein of September 2, 1932, for receivership of Manhattan, the petitioner in paragraph second of said petition referred to said indenture of lease of January 1, 1903, referred to the inability of Interborough to make rental payments to holders of Manhattan bonds and of Manhattan Guaranteed Seven Per Cent. Stock, as so pleaded in said bill of complaint, and said answer in this cause, as constituting, among other things, grounds for the appointment by this Court of a receiver or receivers for Manhattan.

3. That as your petitioners are informed and believe, the said crucial question as to the power of Interborough or of its receivers to disaffirm or repudiate the said indenture of lease of January 1, 1903, is a question which may at any time in this proceeding be directly or indirectly raised in connection with the impending maturity on October first of the obligation of Interborough under said lease to make the quarterly payment of $1.75 per share to each and every holder of said Guaranteed Stock, an amount aggregating $76,142.50; that the payment of said guaranteed rental to the holders of the Seven Per Cent. Guaranteed Stock is an operating item and an operating charge against the properties and assets of Interborough, whether such property and assets be under its own control, or under the control of its receivers in this cause; that for several years past the said obligation for payment of "dividend rentals" to holders of Seven Per Cent. Guaranteed Stock of Manhattan has been carried upon the books and accounts of Interborough as such operating charge upon the same basis as Interborough's obligation to pay taxes upon its own or Manhattan properties; that the obligation of the receivers of Interborough in this cause

to pay said guaranteed rental to holders of such Seven Per Cent. Guaranteed Stock constitutes a right and claim by your petitioners and holders of such stock represented by them as such Protective Committee, which claim is prior to the claim or claims of the holders of any of the outstanding obligations of Interborough, whether secured or unsecured, and prior to the rights of any stockholders of Interborough; that on information and belief the receivers of Interborough will on October 1, 1932, have in their hands sufficient funds to pay as such operating item to the holders of Seven Per Cent. Guaranteed Stock of Manhattan the said aggregate sum of $76,142.50 to which they are entitled both in law and in equity in such priority to any of the classes of obligees or of stockholders of Interborough just hereinbefore mentioned; that there are in this cause as parties, as hereinbefore set forth, no persons or interest whatsoever which from motives of real interest would oppose orders relating to non-payment by Interborough receivers of said rental dividends and which may be submitted to this Court for entry prior to October first and which might destroy or impair or prejudice irreparably the rights of your petitioners and of the other holders of such Seven Per Cent. Guaranteed Stock; that as hereinabove set forth, the Manhattan Railway Company has no such interest; the holders of over ninety per cent. of the stock of Manhattan have an interest which would presumably favor such destruction, impairment or prejudice to your petitioner's rights; that the holders of Manhattan bonds, as set forth above, are so secured that the obligations which they hold, as hereinabove stated, are adequately protected by the mortgages securing such obligations, and therefore have only a secondary interest in safeguarding the integrity and continuance of said indenture of lease of January 1, 1903; that since the obligation of Interborough to the Seven Per Cent. Guaranteed Stock is an obli-

gation prior to the interests of all Interborough obligees or stockholders, there would be as your petitioners believe and state, a concerted attack by various major interests now represented by parties to this cause upon the rights of your petitioners, which attack would not be adequately, if at all, met by any parties with a real interest therein; and that the interests of the holders of the Seven Per Cent. Guaranteed Stock under the said indenture of January 1, 1903, cannot, as your petitioners believe and state, receive adequate or proper protection unless your petitioners, as such Protective Committee, are allowed by
965 order of this Court to become parties to this proceeding by an order to be entered at the earliest possible time consistent with the procedure of this Court, so as to enable them to present to this Court the necessary facts for it to consider in connection with any such proposed order.

NINTH: That your petitioners are praying for an order of this Court allowing your petitioners, as such Protective Committee, to intervene as a party-defendant in this proceeding to assert their rights, as hereinabove set forth, strictly in subordination to the main proceeding in this cause, and would ask either that this petition be treated as a cross-petition against defendant, Interborough Rapid Transit Company, or, that at the proper time after such order allowing intervention shall have been entered herein,
966 your petitioners be permitted to file a separate cross-petition asserting such rights also in subordination to this proceeding.

WHEREFORE, your petitioners, as prayed by them in their original petition for intervention in this cause, dated September 8, 1932, continue to pray that an order be entered herein permitting your petitioners as the Protective Committee for Manhattan Railway Company Seven Per Cent.

Guaranteed Stock to intervene as a party-defendant in this cause, and for such other and further relief as to this Court may seem proper.

Dated, September 12, 1932.

HAROLD PALMER,
NORMAN JOHNSON,
STANLEY R. LATSHAW,
HAROLD SWAIN,
JOHN W. APPEL, JUNIOR,
as the Protective Committee for Seven Per Cent. Guaranteed Stock of Manhattan Railway Company,
by HAROLD PALMER,
Chairman.
NORMAN JOHNSON,
Secretary.

Doc. 32

## Notice of Filing Amended and Substituted Petition for Intervention on Behalf of Harold Palmer and Others as Protective Committee.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

71

*Sirs:*

You and each of you will PLEASE TAKE NOTICE that as solicitors for Harold Palmer, Norman Johnson, Stanley R. Latshaw, Harold Swain and John W. Appel, Junior, acting as the Protective Committee for the Seven Per Cent. Guaranteed Stock of Manhattan Railway Company, we have filed in the office of the Clerk of this Court in the above-entitled cause their amended and substituted petition for intervention (and cross-petition), dated September 12, 1932, copy of which is hereto attached and herewith served upon you and each of you.

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Dated, New York, N. Y., September 14, 1932.

Yours, etc.,

MARSHALL & WEHLE,
Solicitors for Petitioners,
No. 50 Broadway,
New York, N. Y.

To:

MESSRS. CHADBOURNE, STANCHFIELD & LEVY, Solicitors for Victor J. Dowling and Thomas E. Murray, Jr., Temporary Receivers of Interborough Rapid Transit Company, 25 Broadway, New York, N. Y.

MESSRS. HUGHES, SCHURMAN & DWIGHT, Solicitors for William Roberts, Temporary Receiver of Manhattan Railway Company, 100 Broadway, New York, N. Y.

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STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

WINIFRED SINGER, being duly sworn, deposes and says that she is over the age of twenty-one years; that on the 14th day of September, 1932, in the City of New York, Borough of Manhattan, in said County and State, she served the foregoing Notice of Filing upon the following attorneys, namely:

(1) Messrs. Chadbourne, Stanchfield & Levy, Solicitors for Victor J. Dowling and Thomas E. Murray, Jr., as Temporary Receivers of Interborough Rapid Transit Company, at 25 Broadway, in said City, and (2) Messrs. Hughes, Schurman & Dwight, Solicitors for William Roberts, Temporary Receiver of Manhattan Railway Company, at 100 Broadway, in said City, by delivering to and leaving personally with each of said firms of solicitors a true copy thereof.

Deponent further says that she knew the firms so served as aforesaid to be the firms mentioned and described in said Notice of Filing as such solicitors.

WINIFRED SINGER.

Sworn to before me this
14th day of September, 1932.

N. V. CAMPBELL,
Notary Public,
Kings Co. No. 661, Reg. No. 3299.
Certificate filed in N. Y. Co. No. 579, Reg. No. 3C280.

**Petition for Intervention by Elon S. Hobbs.**

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

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|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

*To the Honorable Judges of the District Court of the United States for the Southern District of New York:*

The petition of ELON S. HOBBS, individually, as owner and as solicitor for other owners of certain stock, bonds and notes of the Interborough Rapid Transit Company and of stock in the Manhattan Railway Company, on their behalf and on behalf of all other owners of the stock, bonds or notes of said corporations, and who desire to join in the petition, respectfully shows:

FIRST: That on or about August 25, 1932, The American Brake Shoe and Foundry Company, the plaintiff herein, filed in this Court its Bill of Complaint against the Interborough Rapid Transit Company as a general creditor, and thereupon and on or about August 26, 1932, Victor J. Dowling and Thomas E. Murray, Jr., of the City of New York were duly appointed temporary receivers of the defendant, Interborough Rapid Transit Company, and its property in said suit.

SECOND: Your petitioner, and those he represents at this time, have not deposited, and are not at present inclined to deposit their securities with the so-called protective committees who have intervened herein.

THIRD: Your petitioner agrees with the allegations contained in the intervening petition of the Morgan Committee herein that numerous questions of vital and far-reaching importance so far as they affect the interest of the security holders of the Interborough Rapid Transit Company and of the Manhattan Railway Company will be raised in the above-entitled cause and come before this Court for its decision thereon.

FOURTH: Your petitioner alleges and believes that the most important problem to be considered in this proceeding is the question of a revision of the Interborough Rapid Transit Company's contract with the City that will produce an income sufficient to pay and take care of the operating expenses and dividend and other obligations of the Interborough Rapid Transit Company and the Manhattan Railway Company without changing in principal the 5¢ fare provision of the contract with the City as intended when said contract was made. It is a matter in which the stockholders and the City of New York as the owners of the property and every taxpayer and user of the transit lines are, or should be, profoundly interested.

FIFTH: Your petitioner and those associated with him have developed a readjustment plan which, we believe, will produce the necessary income and for which the approval of not only of the City but of those who are most insistent for a retention of the 5¢ fare can be obtained.

WHEREFORE your petitioner prays that an order be entered permitting your petitioner to intervene representing non-assenting security holders and to be heard on all

matters arising in this cause and that your petitioner be entitled to notice of all proceedings herein and that your petitioner have such other and further relief as to the Court may seem just and proper.

Dated, New York, September 21, 1932.

ELON S. HOBBS,
Petitioner.

Doc. 34

**Receivers' Application No. 9—Petition of Receivers for Instructions with Respect to Payments Payable October 1, 1932, and Thereafter, Under the Manhattan Lease; Also that Guaranty Trust Company of New York, Trustee, Be Made a Party.**

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

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|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

98(

*To the Honorable Judges of the District Court of the United States for the Southern District of New York:*

The petition of Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, upon information and belief, respectfully shows to the Court as follows:

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1. Under date of January 1, 1903, the Manhattan Railway Company (hereinafter referred to as "Manhattan") entered into a lease with the defendant herein (hereinafter referred to as "Interborough") pursuant to which Manhattan leased all of its railroads and other property for a term of 999 years from November 1, 1875, or "so long as the Lessee and its successors shall continue to exist as a corporation and be capable of exercising all the functions herein stipulated on its behalf." A copy of said lease, marked Exhibit 1, is herewith submitted and made

part hereof with the same force as though herein set forth at length.

2. The system of railroads covered by said lease consists of the elevated railroads running along the following routes:

*Ninth Avenue Line:*

From the northerly terminus of Eighth Avenue near the Harlem River; thence through Eighth Avenue to 110th Street; thence through 110th Street and private property to Columbus Avenue; thence through Columbus and Ninth Avenues to Gansevoort Street; thence through Greenwich Street to South Ferry.

*Third Avenue Line:*

Beginning at the Battery, through Pearl Street, Hanover and Franklin Squares, New Bowery, Chatham Square, Bowery, and Third Avenue to 129th Street and Third Avenue; thence through 129th Street to Second Avenue; thence across the Harlem River and through private right of way and intersecting streets to Third Avenue, near 145th Street; thence through Third Avenue to Pelham Avenue; thence through private right of way to a point opposite 198th Street.

From the intersection of Park Row and Brooklyn Bridge through Park Row to Chatham Square.

*Second Avenue Line:*

From the intersection of the Bowery and Division Street, through Division Street and Allen Street to First Avenue, 23rd Street, and Second Avenue to the Harlem River.

*Sixth Avenue Line:*

From the intersection of Morris Street and Trinity Place, through Trinity Place, Church Street,

Murray Street, West Broadway and West 3rd Street to Sixth Avenue; thence through Sixth Avenue to 53rd Street, and through 53rd Street to Ninth Avenue.

3. By the terms of Articles Sixth and Seventh of the lease Interborough agreed to make the following payments annually as rent:

| | |
|---|---|
| (a) For the period from March 31, 1903, to December 31, 1905, an amount equal to the aggregate net earnings of Manhattan, but not more than 7% per annum and not less than 6% per annum upon the outstanding stock of Manhattan; and from and after January 1, 1906, 7% per annum on such stock. Such 7% aggregated annually on the 600,000 shares of Manhattan stock outstanding the sum of..... | $4,200,000 |
| (b) Interest upon the bonds of Manhattan, which at the present time is as follows: | |
| (1) With respect to $40,683,000 principal amount Consolidated Mortgage 4% Bonds..... | 1,627,320 |
| (2) With respect to $4,523,000 principal amount Second Mortgage 4% Bonds..... | 180,920 |
| (c) Cash Rental—the sum of $10,000 annually, which was by supplemental agreement dated March 15, 1913, increased to..... | 35,000 |
| Total..... | $6,043,240 |

4. In addition to the foregoing payments the lease provided that there should be paid by the Lessee all taxes and assessments levied or imposed against the Lessor, its stock or dividends, or its railroads or property.

5. On March 19, 1913, the Public Service Commission for the First District, with the consent of the authorities of the City, issued to Manhattan a certificate authorizing the construction of additional tracks on its Second Avenue, Third Avenue and Ninth Avenue elevated lines. This certificate was subsequently amended by certificate dated May 22, 1914, authorizing changes in tracks and station at 155th Street and Eighth Avenue. The franchise granted by this certificate was for a period of 85 years, subject to termination after ten years by the City, which was authorized to take possession of the additional tracks upon making certain payments. For a complete statement of the terms of said certificates, reference is made to a copy thereof, which is hereto attached as Exhibit 2.

6. An agreement was entered into between Interborough and Manhattan under date of March 15, 1913, under the terms of which Interborough assumed the obligation of paying the cost of constructing the plant and property defined in the certificate from the Public Service Commission and to make all rental and other payments and perform all acts and covenants required of Manhattan by the certificate. For a complete statement of the terms of said agreement, reference is made to a copy thereof, which is hereto attached as Exhibit 3.

7. On March 19, 1913, the Public Service Commission granted to Interborough a certificate authorizing the construction of four lines of railroads described as the Webster Avenue Line, the Eighth Avenue and 162nd Street Connection, the Queensborough Bridge Line, and the West Farms Subway Connection. The franchise under this certificate runs for a period of 85 years, subject to termination after ten years by the City, which is authorized to take possession of said lines upon making certain payments. For a complete statement of the terms of said certificate, reference is made to a copy thereof, which is hereto attached as Exhibit 4.

8. On March 19, 1913, there was also entered into an agreement between the City of New York and Interborough in two capacities: (1) as Lessee under Contract No. 3 (which is one of the contracts which relate to the City-owned subways), and (2) as grantee under the Interborough certificate. By this agreement trackage rights were reserved for the operation of elevated trains upon certain of the City-owned rapid transit railroads. For a complete statement of the terms of said agreement, reference is made to a copy thereof, which is hereto attached as Exhibit 5.

9. The additional tracks on the Second, Third and Ninth Avenue elevated lines, and the railroads provided for by the Interborough certificate, were constructed by the Interborough at its own expense, and operations under the certificate commenced on July 1, 1917. Interborough's investment to June 30, 1932, in said additional tracks and railroads under the 1913 certificates amounted in the aggregate, according to Interborough's books, to $44,597,257.47, divided as follows:

| | |
|---|---|
| Manhattan third-tracking | $21,992,855.42 |
| Manhattan power plant improvements | 5,778,975.21 |
| Elevated railroads under Interborough certificates | 16,825,426.84 |
| Total | $44,597,257.47 |

Said capital expenditure, together with $915,303.96 of capital moneys available in cash on June 30, 1932, was principally represented by the following amounts of Interborough securities outstanding on that date:

| | |
|---|---|
| First Mortgage 5% Bonds | $31,132,537 |
| Ten-Year 7% Notes | 14,650,537 |
| Ten-Year Unsecured 6% Notes | 1,877,552 |
| Total | $47,660,626 |

For the year ended June 30, 1932, the debt service (interest and sinking fund) on these securities amounted to $3,185,435.89. For accounting purposes Interborough has combined the revenue and expenses of the Manhattan lines with that of the lines constructed under the Interborough certificate, and such combined lines are known as the "Manhattan Division."

10. Because of the longer passenger haul involved in the operation of these lines and the increase in operating costs which followed the World War, the earning power of the Manhattan Division was so reduced that it not only yielded no profit to Interborough after July 1, 1917, but failed by a substantial margin to earn fixed charges, consisting of the rentals under the 1903 lease and debt service on Interborough bonds and notes, the proceeds of which had provided for the improvements under the Interborough and Manhattan certificates. There never were profits from its operation apportionable to the City. The following table shows the extent of these Manhattan Division losses for the first five years after operation commenced on July 1, 1917:

| *Year ended June 30* | |
|---|---|
| 1918 | $ 434,649.60 |
| 1919 | 4,598,648.29 |
| 1920 | 5,271,886.24 |
| 1921 | 6,274,632.55 |
| 1922 | 5,316,497.59 |
| Total | $21,896,314.27 |

11. As a result of this operation, Interborough defaulted in 1922 in payment of the rentals under the Manhattan lease, and as of July 1, 1922, there remained unpaid by it under said lease the amount of $9,000,000. To provide for the situation which then arose and for other capital requirements, the 1922 Interborough-Manhattan Readjustment Plan was adopted, one outstanding feature of which

was an agreement by holders of approximately 95% of the capital stock of Manhattan to accept in lieu of the rental of $7 upon each share of their stock, 3% of the par value for the year ending June 30, 1923, 4% for 1924, and 5% thereafter, with the further provision that this reduced rental was to be paid only if earned as provided by the Plan. A copy of the agreement dated November 1, 1922, made by Interborough with a Committee representing stockholders of Manhattan, giving effect to such Plan, is hereto attached as Exhibit 6.

12. In the five years following the adoption of the 1922 Plan the elevated actually carried 180,500,000 less passengers than was estimated in 1921, and while there was a temporary increase in 1927, since 1928 the volume has progressively and consistently declined. The following table shows approximately the passenger traffic on the Manhattan Division from 1922 to 1932 for the fiscal year in each case ending June 30:

| | |
|---|---|
| 1922 | 348,000,000 |
| 1923 | 348,000,000 |
| 1924 | 359,000,000 |
| 1925 | 352,000,000 |
| 1926 | 346,000,000 |
| 1927 | 359,000,000 |
| 1928 | 351,000,000 |
| 1929 | 348,000,000 |
| 1930 | 347,000,000 |
| 1931 | 327,000,000 |
| 1932 | 293,000,000 |

Attempts to find the cause for this situation have been fruitless of tangible result. The reasons which have been suggested for the remarkable falling off in traffic are as follows:

(1) Change in riding habits.

(2) Shift of the City population from the Borough of Manhattan.

(3) Decrease in building activity along the elevated lines.

(4) Increased use of taxicabs.

12-a. The following table shows the extent of the corporate losses of the Interborough for the ten years beginning 1922 in connection with the Manhattan Division operations. The deficits indicated are the amounts by which in each year the Interborough income from the Manhattan Division operations has failed to meet the rentals under the Manhattan lease (including the interest on the bonds of Manhattan) and the debt service of Interborough Rapid Transit bonds and notes whose proceeds were utilized for improvements under the Manhattan and Interborough certificates:

*Year ended June 30*

| | |
|---|---|
| 1923 | $ 3,486,324.72 |
| 1924 | 3,816,266.63 |
| 1925 | 4,542,357.97 |
| 1926 | 4,159,394.38 |
| 1927 | 4,933,222.33 |
| 1928 | 6,111,249.65 |
| 1929 | 3,378,400.05 |
| 1930 | 3,816,480.88 |
| 1931 | 3,905,010.00 |
| 1932 | 4,396,084.00 |
| Total for Period | $42,544,790.61 |
| Deficits 1917-1922 (see p. 6) | 21,896,314.27 |
| Grand Total | $64,441,104.88 |

For the months of July and August, 1932, such deficit on the Manhattan Division aggregated $899,864.89.

12-b. The income from the operations of the Manhattan Division for the four fiscal years ending June 30, 1932, showed a deficit of income, after providing for operating expenses, taxes and current rent deductions, but without providing for the debt service of Interborough bonds and

notes, the proceeds of which were used for improvements under the Manhattan and Interborough Certificates, as follows:

| | |
|---|---|
| 1929 | $ 347,375.72 |
| 1930 | 563,040.75 |
| 1931 | 769,180.72 |
| 1932 | 1,229,788.68 |
| Total | $2,909,385.87 |

Such deficit for the two months of July and August, 1932, amounted to $363,816.70. Thus the operations from the Manhattan Division did not provide sufficient to pay in full the interest upon the Manhattan bonds during the four-year period ending June 30, 1932, and it is estimated by the executive officials of the Receivers that for the current year the deficit will be at least $2,000,000.

12-c. The executive officials of the Receivers estimate that the operations of the Manhattan Division for the three fiscal years beginning June 30, 1932, will result in the following deficits, after providing for taxes and rentals payable under the Manhattan lease, but without providing for the fixed charges on the Interborough securities whose proceeds were utilized for improvements under the Manhattan and Interborough certificates:

| *1933* | *1934* | *1935* |
|---|---|---|
| $2,817,810 | $2,960,810 | $2,817,810 |

13. On May 31, 1932, there became due and payable real estate taxes and special franchise taxes on the properties of Manhattan, which real estate taxes amount to $251,311.10, and the special franchise taxes to $530,693.52. On June 22, 1932, Manhattan demanded that Interborough pay said taxes or deposit in a bank or trust company the amount thereof.

On September 15, 1932, Manhattan and its Receiver, William Roberts, notified your Receivers that the quar-

terly instalment of the Federal Income Tax of Manhattan was payable September 15, 1932, and demanded that such payment be made. Such quarterly payment amounts to approximately $8,473.

On October 1, 1932, there will become payable a semi-annual instalment of interest, amounting to $813,660, upon the outstanding $40,683,000 Consolidated Mortgage 4% Bonds of Manhattan.

On October 1, 1932, there will become payable under the aforementioned lease the quarterly rental on 43,510 shares of Manhattan stock not participating in the 1922 Readjustment Plan, which quarterly rental amounts to $76,142.50.

14. Article 21 of the Manhattan lease provides, among other things, that in case of default in payment of rentals and the same remain unpaid for ninety days after the time when they shall become due and payable, the term of the lease shall at the option of the Lessor expire and cease and determine, and the Lessor shall have the right to enter upon and take possession of the property leased. For a complete statement of the provisions of said Article, reference is made to the lease, Exhibit 1, attached hereto.

15. Under date of March 20, 1913, Interborough executed to Guaranty Trust Company of New York, as Trustee, its First and Refunding Mortgage securing a total issue of $300,000,000 of 5% Gold Bonds dated January 1, 1913, maturing January 1, 1966. Included in the property subjected to said mortgage in the above-mentioned lease executed by Manhattan to Interborough, dated January 1, 1903, and all rights of Interborough thereunder, as well as in the above-mentioned agreement dated March 15, 1913, between said companies, as well as all rights of Interborough thereunder.

There were also included in the mortgaged property all franchises, licenses and rights vested in Interborough under the above-mentioned certificate dated March 19, 1913.

granted to Interborough by the Public Service Commission for the First District, and in all railroads and property constructed or acquired pursuant thereto, and in all sums of money or other property receivable by Interborough thereunder.

There were also included in the mortgaged property all rights, interests and property of Interborough under the certificate dated March 19, 1913, granted to Manhattan by said Public Service Commission. The granting clause in said mortgage respecting said certificate reads as follows:

> "* * * (a) the leasehold interest of the Interborough Company thereunder, and all the right, title, interest, claim and demand whatsoever of the Interborough Company of, in and to said contract and the premises and property subject or to become subject thereto; (b) any and all sums of money, indemnity bonds or other security, and other property of every kind, payable or paid to, or receivable or received by, the Interborough Company or its successors, in the event of the termination by The City of New York of said contract under any of the provisions thereof; and (c) any and all sums of money, indemnity bonds or other security and other property of every kind, payable or paid to, or receivable or received by, the Interborough Company or its successors, in the event that The City of New York or its licensees shall enter into the possession of and operate the railroads or any thereof subject to the provisions of said contract."

By the terms of said mortgage Interborough covenanted to "pay the rent reserved and all other payments required to be made in, and in all other respects whatsoever will comply with all of the conditions, covenants, terms, stipulations and provisions of, the said lease to the Interborough Company made by the Manhattan Railway Company and any agreement amendatory thereof or supplemental

thereto." There was also a covenant that Interborough will comply with all of the terms and conditions set forth in the above-mentioned certificates of the Public Service Commission to Interborough and Manhattan respectively.

16. There are outstanding in the hands of the public $132,228,000 principal amount of First and Refunding Mortgage Gold Bonds, and $54,989,000 principal amount of said bonds are pledged as security for the 7% secured Gold Notes of Interborough maturing September 1, 1932. In addition there are $40,140,000 principal amount of said bonds held in the sinking fund under said Mortgage, and $6,556,000 principal amount are held in special trust for future sinking fund payments. In addition approximately $1,169,308 in cash is held by the Trustee in the sinking fund under said Mortgage.

17. Your Receivers have not had sufficient time to make as complete an investigation as may be necessary to enable them to make recommendations to the Court with respect to the action to be taken by them in connection with the foregoing matters.

WHEREFORE, in view of the premises, your petitioners respectively pray to the Court that they may receive the instructions of the Court with respect to the payment of the amounts which have heretofore become due and payable and which will on October 1, 1932, and thereafter become payable by way of rental under the lease from Manhattan; that in view of the interest of Guaranty Trust Company of New York, as Trustee under the First & Refunding Mortgage of Interborough, dated March 20, 1913, as above set forth, said Trustee be brought in as a party to this cause; that all the parties to this cause, including the intervenors and said Guaranty Trust Company of New York, as Trustee as aforesaid, be directed to answer the foregoing petition on such date as the Court may fix, and that the foregoing matters be set down for

hearing thereafter; that this Court order and direct that pending hearing and final adjudication of this Court on the matters set forth in this petition, no acts or action of the petitioners shall be deemed to constitute either an adoption or rejection of said lease or of any of the agreements hereinbefore set forth; and that the Court grant such other and further relief in the premises as to it may seem necessary and proper.

VICTOR J. DOWLING,
THOMAS E. MURRAY, JR.,
As Receivers for Interborough Rapid
Transit Company,
*Petitioners.*

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Receivers,
Office & P. O. Address,
25 Broadway,
Borough of Manhattan,
New York City.

WM. WALLACE, of Counsel.

**Attached to the original of the foregoing application were the following documents as exhibits, each of which is printed as part of a separate volume of Receivership Record Exhibits.**

EXHIBIT 1.

Manhattan Railway Company to Interborough Rapid Transit Company—LEASE—Dated January 1, 1903.

EXHIBIT 2.

Public Service Commission for the First District to Interborough Rapid Transit Company—Webster Avenue Line, Eighth Avenue and 162nd Street Connection, Queensboro Bridge Line, West Farms Subway Connection—CERTIFICATE—Dated March 19th, 1913.

EXHIBIT 2-A.

Certificate granted to the Manhattan Railway Company by the Public Service Commission for the First District, modifying Certificate dated March 19, 1913, authorizing additional tracks to elevated lines of the Company on Eighth Avenue, between 152nd and 159th Streets, and changes in the terminal facilities at and near 155th Street —Dated May 22, 1914.

EXHIBIT 3.

Manhattan Railway Company with Interborough Rapid Transit Company—AGREEMENT—Dated March 15th, 1913.

*American Brake Shoe Record.*
*Exhibits Attached to Petition.*

## EXHIBIT 4.

Public Service Commission for the First District to Manhattan Railway Company—Second Avenue, Third Avenue and Ninth Avenue Additional Tracks—CERTIFICATE—Dated March 19, 1913.

## EXHIBIT 4-A.

Public Service Commission for the First District to Interborough Rapid Transit Company—Certificate dated May 22nd, 1914, Modifying Terms of Certificate to Interborough Rapid Transit Company, dated March 19, 1913.

## EXHIBIT 5.

The City of New York, by the Public Service Commission for the First District, with Interborough Rapid Transit Company, Lessee and Grantee—SUPPLEMENTARY AGREEMENT—Trackage Rights—Seventh Avenue-Lexington Avenue Line, White Plains Road Line and Steinway Tunnel Line—Dated March 19th, 1913.

## EXHIBIT 6.

Interborough Rapid Transit Company and Alvin W. Krech, Lewis L. Clarke, Bertram Cutler, Alfred Skitt, Frederick Strauss and Thomas H. West, Jr., acting as a Committee representing Stockholders of Manhattan Railway Company—AGREEMENT—Dated November 1, 1922.

Doc. 35-A

## Receivers' Application No. 7, September 21, 1932—Petition for Order Authorizing Receivers to Employ Court Reporters.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

*To the Honorable Judges of the District Court of the United States for the Southern District of New York:*

The petition of Victor J. Dowling and Thomas E. Murray, Jr., Receivers herein of Interborough Rapid Transit Company, upon information and belief respectfully shows to this Court that from time to time there will be hearings before this Court in which testimony will be offered and arguments made by counsel and that it is desirable that such testimony and arguments be reported by competent court reporters; that the Southern District Court Reporters, 15 Park Row, New York, N. Y., have been designated as official court reporters by this Court.

WHEREFORE, your petitioners pray that an order may be made by this Court authorizing and directing the Receivers to employ as court reporters for the taking of testimony and reporting of arguments made before this Court

*American Brake Shoe Record.*
*Receiver's Application No. 7.*

in these proceedings the Southern District Court Reporters, 15 Park Row, New York, N. Y.

Dated, New York, N. Y., September 21, 1932.

VICTOR J. DOWLING,
THOMAS E. MURRAY, JR.,
Receivers of Interborough Rapid Transit Company.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for said Receivers.
Office and P. O. Address,
No. 25 Broadway,
Borough of Manhattan,
New York, N. Y.

WM. WALLACE, of Counsel.

Doc. 35-B

## Waiver and Consent.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

We hereby waive notice of the within petition and consent to the granting and entering of the attached order.

Dated, New York, N. Y., September 23, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

JAMES L. QUACKENBUSH,
Attorney for Defendant.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committe constituted by and acting under the Deposit Agreement, dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes.

*American Brake Shoe Record.*
*Waiver and Consent.*

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds.

ROOT, CLARK & BUCKNER,
Attorneys for the Committee for the Protection of the Holders of Ten-Year Six Per Cent Gold Notes due October 1, 1932, of Interborough Rapid Transit Company.

COTTON, FRANKLIN, WRIGHT & GORDON,
Attorneys for the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds.

HUGHES, SCHURMAN & DWIGHT,
Attorneys for the Receiver of Manhattan Railway Company.

DILLS, MUECKE & SCHELKER,
Attorneys for Manhattan Railway Company.

Doc. 36

## Notice of Motion for Order Respecting Sinking Fund Moneys.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| AMERICAN BRAKE SHOE & FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

*Sirs:*

PLEASE TAKE NOTICE that upon the petition hereto attached of Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, we shall move the Court on Monday, October 3, 1932, at 3 o'clock P. M., or as soon thereafter as counsel can be heard, in Room 439, United States Post Office Building, for an order instructing and directing said Receivers to take no action respecting the sinking fund moneys held by Guaranty Trust Company of New York as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company dated March 20, 1913, on the ground that such moneys are trust funds in the possession of said

Trustee, and for such further relief in the premises as may be just.

Dated, New York, October 1, 1932.

Yours, etc.,

CHADBOURNE, STANCHFIELD & LEVY,
Attorneys for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company,
Office & P. O. Address,
25 Broadway,
Borough of Manhattan,
New York City.

To:

MESSRS. BREED, ABBOTT & MORGAN,
Attorneys for Complainant,
15 Broad Street, New York City.

JAMES L. QUACKENBUSH, Esq.,
Attorney for Defendant,
165 Broadway, New York City.

MESSRS. DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Committee for Interborough Rapid Transit Company 10-Year Secured Convertible 7% Gold Notes due September 1, 1932, and for Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds due January 1, 1966, and for Guaranty Trust Company of New York as Trustee under said Mortgage,
15 Broad Street, New York City.

MESSRS. ROOT, CLARK & BUCKNER,
Attorneys for Committee for Interborough Rapid Transit Company 10-Year 6% Gold Notes due October 1, 1932,
31 Nassau Street, New York City.

MESSRS. DILLS, MUECKE & SCHELKER,
Attorneys for Manhattan Railway Company,
1 Pershing Square, New York City.

MESSRS. HUGHES, SCHURMAN & DWIGHT,
Attorneys for William Roberts, Receiver of Manhattan Railway Company,
100 Broadway, New York City.

MESSRS. COTTON, FRANKLIN, WRIGHT & GORDON,
Attorneys for Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Gold Bonds,
63 Wall Street, New York City.

MESSRS. DAVIES, AUERBACH & CORNELL,
Attorneys for Central Hanover Bank & Trust Company as Trustee under Consolidated Mortgage of Manhattan Railway Company,
1 Wall Street, New York City.

MESSRS. MILBANK, TWEED, HOPE & WEBB,
Attorneys for Chase National Bank of the City of New York as Trustee under Second Mortgage of Manhattan Railway Company,
15 Broad Street, New York City.

MESSRS. MARSHALL & WEHLE,
Attorneys for Protective Committee for 7% Guaranteed Stock of Manhattan Railway Company,
50 Broadway, New York City.

Doc. 36b

**Receivers' Application No. 8—Application of Receivers for Instructions with Reference to Certain Sinking Fund Moneys Now Held by Guaranty Trust Company of New York, as Trustee under First and Refunding Mortgage of Interborough Rapid Transit Company, Dated March 20, 1913.**

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

*To the Honorable Judges of the District Court of the United States for the Southern District of New York:*

The petition of Victor J. Dowling and Thomas E. Murray, Jr., Receivers of defendant, Interborough Rapid Transit Company, upon information and belief, respectfully shows to the Court as follows:

1. Guaranty Trust Company of New York is the existing and acting Trustee under the First and Refunding Mortgage of the defendant, Interborough Rapid Transit

Company, to Guaranty Trust Company of New York, as Trustee, dated March 20, 1913, created to secure an authorized issue of $300,000,000 principal amount of First and Refunding Mortgage 5% Gold Bonds (hereinafter called the "Bonds") of the defendant, Interborough Rapid Transit Company. According to the records of the defendant, Interborough Rapid Transit Company, there are now issued and outstanding (a) in the hands of the public bonds secured by said mortgage in excess of $132,000,000 principal amount, and (b) additional bonds in excess of $54,000,000 principal amount pledged to secure an issue of Ten-Year Secured Convertible 7% Gold Notes of the defendant Company. Said First and Refunding Mortgage purports to be secured by a lien on the property of the defendant Company therein described, including property described in Granting Clause XIII of the First and Refunding Mortgage, which reads as follows:

> "XIII. All property of every name and nature, from time to time hereafter, by delivery or by writing of any kind, for the purposes hereof, pledged, assigned or transferred by the Interborough Company, or with its written consent by anyone in its behalf, to the Trustee, which hereby is authorized to receive any property at any and all times, as and for additional security, and also, when and as hereinafter provided, as substituted security, for the payment of the bonds issued or to be issued hereunder, and to hold and apply any and all such property according to the terms hereof."

Your Receivers, contemporaneously with the filing of this application, have filed with the Clerk of the United States District Court for the Southern District of New York in the above entitled cause, a copy of said First and Refunding Mortgage as Exhibit A in said cause, to which Exhibit A reference is hereby made for a more particular descrip-

tion of the terms and provisions of said First and Refunding Mortgage and the nature and extent of the security purported to be created hereby.

2. Said Bonds and said First and Refunding Mortgage contain provisions for the retirement and/or redemption of Bonds through operation of the Sinking Fund. The provision in the Bonds with respect to the Sinking Fund is as follows:

> "This bond may be redeemed by payment of the principal of this bond together with a premium of ten per centum (10%) of such principal, either through the operation of the sinking fund in the said mortgage provided for, or, at the option of the Company, upon any interest day, provided in either case that notice thereof shall have been published in two newspapers in the Borough of Manhattan, City of New York, once a week for at least four weeks, all as provided in said mortgage; accrued interest to the date of redemption being payable upon presentation and surrender of the coupon therefor."

The provisions of the First and Refunding Mortgage with respect to the payment and application of the Sinking Fund are found in Article Four of the First and Refunding Mortgage, and read as follows:

"ARTICLE FOUR.

Section 1. The Trustee and the successor of the Trustee from time to time shall be, and hereby is, appointed custodian of the Sinking Fund hereunder. The Trustee agrees to keep true and accurate accounts of all transactions of the Sinking Fund, to furnish information concerning the same to the Interborough Company on its request, and to afford

to the Public Service Commission access to all accounts, records, vouchers, and memoranda having to do with such Sinking Fund.

Sec. 2. On the first day of July, 1918, and on the first day of January and the first day of July in each calendar year thereafter, the Interborough Company shall pay and deliver to the Trustee a sum equal to one-half of one per centum of the face amount of all bonds issued and outstanding hereunder (including bonds held in the Sinking Fund), which sum may be paid either in cash or in bonds (bearing all unmatured coupons) of this issue or partly in cash and partly in bonds, such bonds being estimated at their face value of principal; provided, however, that in every case there shall be paid in cash a sum equal to one-half of one per centum of the face amount of all outstanding bonds (including bonds held in the Sinking Fund) issued hereunder for the purpose of Additions, as defined in the aforesaid Contract No. 3 and as set forth in clause (e) of Part B of Section 4 of Article One of this indenture.

If and when, under the provisions of Section 4 of Article One of this indenture, bonds hereby secured shall be issued to provide for the construction or for the equipment or appurtenances of railroads, pursuant to any contract or lease or agreement hereafter made with the City of New York, or pursuant to any certificate hereafter granted by the Public Service Commission, entitling the City of New York, or its licensee or any other corporation or person to take possession of all or of any of the railroads subject thereto, then in respect of such bonds, in addition to the Sinking Fund payments at the rate aforesaid, there shall be paid semi-annually into the Sinking Fund such amount as may be computed to be necessary to acquire from time to

time for the Sinking Fund so many of such bonds that at no time shall the aggregate redemption price of the remainder of such bonds outstanding exceed the amount of the moneys payable by the City of New York, or its licensee or other corporation or person, if at such time it or they were to take possession of the property as above mentioned; it being intended that unless the property acquired with such bonds, or their proceeds, shall remain subject to the lien of this indenture until all of the bonds hereby secured shall be redeemed or be paid, the provisions of this Article shall secure the prompt redemption of such bonds if and when the Interborough Company shall cease to retain the possession of such property.

In case the railroads, for the construction of which provision is made in the aforesaid Contract No. 3 between the City of New York and the Interborough Company, shall be opened for initial operation (as specified in said Contract No. 3) prior to the year 1918, said Sinking Fund payments, at the rate aforesaid, shall begin on the interest date next succeeding such initial operation, and continue semi-yearly thereafter as aforesaid—the amount of the first of such payments so payable after such initial operation to be such proportion of the semi-yearly installment of one-half of one per cent. as the number of days on which such railroads are operated during such half year in which such initial operation shall begin, bears to the total number of days in such half year.

At its option, the Interborough Company at any time and from time to time may pay as aforesaid additional sums into the Sinking Fund.

Any such cash so received, and also any other moneys paid into the Sinking Fund pursuant to any provision of this indenture, shall be held and

be applied by the Sinking Fund Trustee as in this Section provided, that is to say:

(a) If within twenty days after the receipt by the Trustee of any such cash sinking fund payment, the Interborough Company shall be authorized and able to sell and to deliver bonds authorized to be issued under this indenture (and not theretofore sold by it to others), the Interborough Company may, and if required by the Public Service Commission it shall, tender such bonds to the Trustee for purchase for the Sinking Fund, and thereupon the Trustee shall use the moneys then in the Sinking Fund (so far as the same are sufficient) for the purchase of such bonds for the Sinking Fund, at the price at which the Interborough Company is authorized to issue such bonds; provided, however, that such price be not in excess of the average market price of such bonds in the New York Stock Exchange (if any) for the previous calendar month, as such market price shall be determined by the Trustee. To accomplish the purpose of this provision, the Interborough Company shall at such time make its sinking-fund payment either in cash or in bonds at the authorized price of issue, to such amount as, with any other moneys in the Sinking Fund, shall be sufficient to enable the Trustee to acquire the bonds authorized to be tendered for the Sinking Fund as in this paragraph above provided.

If upon the expiration of any such period of twenty days, there shall remain in the Sinking Fund a balance of moneys after deducting any amounts used or required for the purchase of bonds as before in this section provided, the Trustee shall begin publication in at least two newspapers of general circulation published in the Borough of Manhattan, City of New York, once in each week

(beginning on any day of the week) for four successive weeks, of notice that it will purchase for the Sinking Fund to the extent of the cash sinking fund in its hands, bonds secured hereby then outstanding, at the lowest price at which bonds (including interest accrued thereon), on or before the first day of April or of October, as the case may be, next ensuing after such publication, shall be offered to the Trustee, not exceeding 110 per cent. of the face value of principal thereof; and thereupon the Trustee shall apply the cash sinking fund then in its hands to the purchase of bonds (including all unpaid coupons and unmatured interest obligations) tendered to it as aforesaid, at not exceeding 110 per cent of the face value of principal thereof, giving preference in such purchases to the bonds which shall be offered at the lowest price. In case bonds shall be offered by two or more holders at the same price, to an amount in the aggregate exceeding the cash sinking fund applicable thereto acceptance of such offers shall be made by the Trustee in the order of the date of the reception by it of such offers; and if such equal offers of two or more bondholders be received by the Trustee at the same time, then each offer shall be accepted to an amount (as near as may be) which shall bear to such offer substantially the same proportion as such cash sinking fund shall bear to the aggregate of such simultaneous equal offers. All offers by bondholders, as aforesaid, shall be made subject to such acceptance of a portion thereof.

At any time during the period in which bondholders may offer bonds for the Sinking Fund as above provided, the Interborough Company itself shall have the right to tender to the Trustee for the Sinking Fund any bonds issued under this inden-

ture, and any tender of bonds by the Interborough Company shall be accepted by the Trustee in preference to any other tender of bonds by bondholders at the same price or any higher price.

(b) If, prior to the first day of May or of November, as the case may be, next ensuing after receipt of such cash, the Trustee shall not upon the terms so indicated have purchased such bonds to an amount sufficient to exhaust such moneys, then such moneys, or any unapplied portion thereof in excess of $10,000, shall be applied to the acquisition for the Sinking Fund or the interest date next ensuing of said bonds (excluding coupons and interest obligations maturing prior to and on such interest date) at the rate of 110 per cent of the face value of principal thereof, by lot as next hereinafter provided.

The Trustee shall draw by lot, referring to the serial numbers thereof, such amount of the outstanding bonds as in the opinion of the Trustee such moneys so held by the Trustee shall suffice to acquire at the rate aforesaid. If any serial number endorsed upon any registered bond without coupons of a denomination greater than $1,000, shall be designated at such drawing, such registered bond shall be surrendered to the Trustee at or after the date fixed as above provided, and thereupon coupon bonds and registered bonds without coupons, or either, for the unpaid balance, if any, of the face amount of the registered bond without coupons so surrendered, shall simultaneously with surrender be issued by the Interborough Company without charge therefor. The Trustee shall forthwith cancel the registered bond when surrendered.

After such drawing, the numbers of all bonds so designated by lot shall be published by and in the name of the Interborough Company, as directed by

the Trustee, once in each week (beginning on any day of the week) for four successive weeks, in the calendar month next preceding the date of such redemption, in two or more newspapers of general circulation published in the Borough of Manhattan, City of New York, New York, with a notice that upon surrender to the Trustee of such bond with all coupons and interest obligations subsequently maturing, the principal sum of such bond and a premium of ten per cent. of such principal, will be paid upon the next ensuing interest date.

Upon publication of such notice as aforesaid, the bonds so designated shall be payable on the date, at the place and at the rate in such notice stated. 107(

The coupon or claim for interest upon any bond drawn and called for such acquisition, maturing on or prior to the date fixed for such acquisition, shall be payable by the Interborough Company in accordance with the provisions in that respect in said bonds and coupons contained.

After such date so designated, no interest shall accrue or shall be payable upon or in respect of any bond so designated and notified, nor shall any coupon representing any such subsequently accruing interest be of any force or effect.

Payment of the sum payable for principal and premium of each coupon bond drawn for acquisition for the Sinking Fund, shall be made to the bearer of such bond upon surrender, on or after the date designated as aforesaid, of such bond and of all coupons for interest thereon maturing subsequently to the date for acquisition designated in such notice, and payment of the sum payable for principal and premium of each registered bond drawn for such acquisition shall be made to the registered holder of such bond, upon surrender thereof duly endorsed for transfer. 1077

(c) All bonds acquired by the Trustee for the Sinking Fund shall be deemed to remain alive for the purposes of the Sinking Fund, and shall not again be issued, and shall be stamped: 'Not negotiable. Held for Sinking Fund under First and Refunding Mortgage dated March 20, 1913, of Interborough Rapid Transit Company to Guaranty Trust Company of New York.' The Interborough Company shall duly pay to the Trustee the amount of all interest obligations upon all bonds acquired and held for the Sinking Fund as aforesaid, when and as such interest shall respectively become due, upon surrender and cancellation of any coupons representing such interest obligations, and the amounts so received by the Sinking Fund Trustee shall be added to the Sinking Fund and applied as provided in this Section 2."

3. Pursuant to the provisions of Section 2 of Article Four of said First and Refunding Mortgage, defendant, Interborough Rapid Transit Company, on or about July 1, 1932, and prior to the appointment of Receivers in this cause, and prior to the filing of the complaint of The American Brake Shoe and Foundry Company in this cause, paid to Guaranty Trust Company of New York, as Trustee and Custodian of the Sinking Fund, the sum of $1,169,308.24, such payment being made as and for the Sinking Fund payment required to be made by defendant, Interborough Rapid Transit Company, pursuant to the provisions of Section 2 of said Article Four. Neither the defendant, Interborough Rapid Transit Company, nor your Receivers have been authorized or have been able or are able to sell and deliver Bonds to the Trustee for purchase for the Sinking Fund as permitted by paragraph (a) of Section 2 of Article Four of said First and Refunding Mortgage, nor will said defendant, Interborough Rapid Transit Company, or your Receivers be able to sell and

deliver Bonds to said Trustee for purchase for the Sinking Fund on or prior to October 1, 1932, nor has the Public Service Commission required the tender and delibery by defendant, Interborough Rapid Transit Company, or your Receivers of Bonds to the Trustee for purchase for the Sinking Fund pursuant to the provisions of said paragraph (a), though a period of more than twenty days has elapsed since the receipt by the Trustee of the cash Sinking Fund payment above mentioned.

4. Your Receivers are advised that Guaranty Trust Company of New York, as Trustee and Sinking Fund Custodian aforesaid, has caused to be published notices in newspapers of general circulation in the Borough of Manhattan, City of New York, in accordance with the provisions of Section 2 of Article Four of said mortgage, and proposed to purchase on or prior to October 1, 1932, Bonds tendered to it for purchase, from moneys in said Sinking Fund, at the lowest prices and in an amount sufficient to exhaust the cash held by said Trustee in the Sinking Fund.

5. First and Refunding Mortgage Bonds of the defendant, Interborough Rapid Transit Company, are listed on the New York Stock Exchange, and the prices of said Bonds as quoted on said New York Stock Exchange (the Company having paid the interest on said Bonds due July 1, 1932, and not at the present time being in default with respect to any interest) are exclusive of accruals of interest from July 1, 1932, on the Bonds, so that there must be added to the quoted price the accumulated interest to date of purchase in determining the actual cost of a Bond purchased on such Exchange. Quotations are also given in figures which are equivalent to a per cent. of the principal amount of the Bond. The closing market quotation of First and Refunding Mortgage Bonds of the defendant Company on September 26, 1932, on the New York Stock Exchange was 45⅜ and the average market quotation and

price for that part of the month of September, 1932, terminating on September 26, 1932, for said Bonds was 47, the quotations for said Bonds having fluctuated for the period from September 1, 1932, to September 26, 1932, from a high of 45¾ to a low of 45¼. The quotations on said Bonds on the New York Stock Exchange since July 1, 1932, have varied from a high of 58 to a low of 34¾, with an average quotation since July 1, 1932, of 46⅜.

6. Since the appointment of your Receivers, your Receivers have had no opportunity to make an extended investigation as to the status of said First and Refunding Mortgage, the extent and nature of the lien thereof, nor as to the status of the Bonds issued thereunder, the extent of its financial requirements, nor the availability of funds to meet such requirements, nor are your Receivers able at present to determine whether or not events of default, if any, have occurred under said First and Refunding Mortgage. As soon as your Receivers have had an opportunity to make a more extended investigation with respect to the foregoing matters, your Receivers expect to apply to the Court for appropriate instructions.

7. Your Receivers have made no demand upon the Guaranty Trust Company of New York, as Trustee and Sinking Fund Custodian under said First and Refunding Mortgage, for the payment to it of the sum of $1,169,308.24 referred to in paragraph 4 of this application, your Receivers being advised by counsel that, in their opinion, the taking of any action which would prevent the application of said sum of $1,169,308.24 held in the Sinking Fund by Guaranty Trust Company of New York on or prior to October 1, 1932, to the purchase of Bonds tendered to it would in all probability constitute a default under the First and Refunding Mortgage of the defendant Company.

WHEREFORE, your Receivers pray the instructions of this Court with respect to making a demand on Guaranty Trust Company of New York for the payment to your Receivers of the moneys now held by the said Guaranty Trust Company of New York, as Trustee and Custodian of the Sinking Fund, and for instructions as to whether or not your Receivers should take any other action with respect to said Sinking Fund moneys so held by Guaranty Trust Company of New York, and your petitioners further pray that they may receive the instructions of the Court in the premises.

Dated, New York, N. Y., September 28, 1932.

VICTOR J. DOWLING,
THOMAS E. MURRAY, JR.,
Receivers.

CHADBOURNE, STANCHFIELD & LEVY,
Attorneys for Receivers,
Office and P. O. Address,
No. 25 Broadway,
Borough of Manhattan,
New York, N. Y.

Doc. 47

## Notice by Receiver of Manhattan Railway Company of Application for Order Re Interest Due on First Mortgage Bonds of Manhattan and for Payment of Taxes.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

091

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| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

PLEASE TAKE NOTICE that upon the annexed petition of William Roberts, Receiver of Manhattan Railway Company, and upon the proceedings had herein, an application
092 will be made to Hon. Martin T. Manton, United States Circuit Judge designated to hold a term of the District Court of the United States for the Southern District of New York at Room 439, at the Old Post Office Building, Borough of Manhattan, City of New York, at 5 o'clock in the afternoon on September 28, 1932, for an order directing Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, to pay the interest due upon the First Mortgage Bonds of Manhattan Railway Company on October 1, 1932, and the taxes which

have been assessed against the properties of Manhattan Railway Company and are now in default, and granting the other relief requested in said petition.

Dated, New York, September 28, 1932.

Yours, etc.,

HUGHES, SCHURMAN & DWIGHT,
Solicitors for William Roberts, Receiver of Manhattan Railway Company.

To:

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company.

Doc. 47a

**Petition of Receiver of Manhattan Railway Company for Order for Payment of Interest on First Mortgage Bonds of Manhattan and for Payment of Taxes.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

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|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

*To the Honorable the Judges of the United States District Court for the Southern District of New York:*

The petition of William Roberts, Receiver of Manhattan Railway Company, respectfully shows to the Court:

I. He is the duly qualified and acting Receiver of Manhattan Railway Company.

II. Manhattan Railway Company is a railroad corporation organized under the laws of the State of New York and owns a system of elevated railroads in the Boroughs of Manhattan and The Bronx, in the City of New York, which system it leased to the Interborough Rapid Transit Company for the term of 999 years from November 1, 1875, under the terms and conditions and for the rentals set forth in the lease. At the time of the appointment of the Receivers of the property of the Interborough Rapid Tran-

sit Company, that Company was in possession of and was operating its elevated railroads.

III. By the aforesaid lease, the Interborough Rapid Transit Company, as lessee, assumed and agreed among other things to pay to the Manhattan Railway Company as rent the interest on the latter's outstanding bonds which consisted, at the time of the appointment of Receivers, of $40,683,000 principal amount of consolidated mortgage 4% bonds under an indenture dated February 26, 1890, and a supplemental indenture dated June 13, 1899, of which Central Hanover Bank & Trust Company is now Trustee, and $4,523,000 principal amount of second mortgage 4% bonds under an indenture dated June 1, 1913, of which The Chase National Bank of the City of New York is now Trustee. The said lessee also agreed to pay as rent annual dividends at the rate of 7% per annum on the shares of stock of the lessor, consisting of 600,000 shares of the par value of $100 each (an aggregate of $60,000,000) and further agreed to pay as rent, as and when they became due, the taxes, assessments and charges imposed upon the lessor.

IV. The Interborough Rapid Transit Company has failed to pay, in accordance with the terms of said lease, certain special franchise taxes and real estate taxes against the Manhattan Railroad Company amounting to not less than $780,000 and alleged in the bill of complaint herein and admitted by the answer to be in excess of $860,000 and the Receivers of the Interborough Rapid Transit Company have likewise neglected to pay said taxes. By reason of such failure, a default has occurred under the consolidated mortgage and the second mortgage above mentioned.

V. On October 1, 1932, interest in the amount of $813,660 will become due on the $40,683,000 principal amount of consolidated mortgage bonds of Manhattan

Railway Company. Also on October 1, 1932, there will be due and payable a quarterly payment of dividend rental at the rate of 7% per annum, amounting to $76,142.50, on 43,510 shares of stock which did not participate in the Interborough-Manhattan Readjustment Plan of 1922 hereinafter mentioned and $25,000 payable to Manhattan Railway Company.

VI. If this interest is not paid and the tax default under the mortgages is not remedied, the Manhattan Company is confronted with the possibility of an acceleration of the principal amount of its bonds, a foreclosure of the mortgages and a sale of the Manhattan Company properties, with the consequent destruction of the large equity value over and above the principal amount of the mortgages and a dismemberment of the dual system of rapid transit of the City of New York contemplated and provided for by the subway contract and elevated certificates of 1913 pursuant to which the Interborough Rapid Transit Company and the City of New York and Manhattan Railway Company have made large investments.

VII. The properties of the Manhattan Railway Company which are subject to the said lease and all the moneys that have arisen and will arise from the operation thereof are in the possession of the Receivers of Interborough Rapid Transit Company and petitioner has no way of providing the funds necessary to remedy said default and meet said bond interest except by application to this Court.

VIII. The amount of said taxes and bond interest is far less than the amount to which the Manhattan Railway Company is justly and reasonably entitled as proper compensation for the use of its properties and petitioner believes that the Receivers of Interborough Rapid Transit Company have ample funds from which said payments should be made.

IX. The income of the Interborough Rapid Transit Company and of the Receivers thereof from the operation of the dual system of rapid transit railroads in the City of New York is derived principally from the subway and elevated divisions. Under Contract No. 3 relating to the subways, the Interborough Company has, for many years, received and the Receivers thereof will continue to receive a net profit amounting to not less than $3,170,000 per year over and above all expenses of operation including interest and sinking fund charges on all Interborough obligations issued for the construction or equipment of the subways. This sum may be referred to as the net subway preferential.

X. According to preliminary figures available for the year ended June 30, 1932, the net income before payment of taxes obtained by Interborough Rapid Transit Company from the Manhattan division was $3,066,918.00. This sum added to the aforesaid subway net preferential gives a total net revenue available for taxes and fixed charges upon the Manhattan elevated division and other corporate purposes of over $6,000,000 each year.

XI. It is believed that the value of the properties of the Manhattan Railway Company in the possession of the Receivers of the Interborough Company exclusive of additional tracks, power house improvements and extensions constructed pursuant to the certificates of 1913, is not less than $142,000,000; that the cost to Interborough Rapid Transit Company of the elevated extensions and of the third tracks and power plant improvements, has not been in excess of $45,000,000. It is believed that the investment by the Interborough Company in the third tracks and power house improvements upon Manhattan Railway Company property was not less than $27,000,000 and that this investment will be entirely lost to the Interborough and its Receivers in the event of

the termination of the lease. Of the total value of the property devoted for the public use by Interborough Rapid Transit Company and Manhattan Railway Company in connection with the elevated division it is believed that at least five-sixths belongs to the Manhattan Railway Company and is subject to the lien of the first mortgage.

XII. At the time the dual system contracts were entered into by the Interborough Company and the Manhattan Railway Company in 1913, the Manhattan lease was very profitable to Interborough Rapid Transit Company. The earning power of the Manhattan lines was such that the Interborough Rapid Transit Company, as lessee, was able to pay all expenses of operation, taxes and rental amounting to over $6,000,000 each year and nevertheless obtain a net profit upon the lease averaging, over a number of years, approximately $1,500,000.

XIII. By the agreement made by the Interborough Rapid Transit Company with the City of New York in 1913 as construed by the courts, the Interborough Company agreed to operate the elevated railroads constructed pursuant to the elevated certificates together with the lines leased from the Manhattan Railway Company for a five-cent fare. The Manhattan Railway Company has no agreement with the City of New York that its railroads should be operated on a five-cent fare and the earnings of the Manhattan Railway division, as operated by Interborough Rapid Transit Company, is no criterion of the earning power of the railroads of the Manhattan Railway Company under normal conditions and apart from the contractual obligations of Interborough Rapid Transit Company to the City of New York as to the rate of fare to be charged.

XIV. Prior to the Readjustment Plan of 1922 the rental payable by Interborough Rapid Transit Company

to Manhattan Railway Company and its security holders was as follows:

| | |
|---|---|
| Interest upon outstanding consolidated mortgage bonds of the Manhattan Company | $1,627,320.00 |
| Interest upon Second Mortgage bonds of the Manhattan Company | 180,920.00 |
| Cash rental | 35,000.00 |
| 7% guaranteed rental on $60,000,000 of Manhattan Railway Company stock | 4,200,000.00 |
| | $6,043,240.00 |

XV. In 1922 arrangements were made between the Interborough Rapid Transit Company and the holders of approximately 93% of the outstanding capital stock of Manhattan Railway Company and the Manhattan Railway Company whereby the cash rental payable annually was increased to $50,000 per year and the dividend rental payable to stockholders participating in the plan was due only if earned as provided therein. Since the quarter ending October 1, 1927, the usual rental paid by Interborough Rapid Transit Company to the Manhattan Company and its security holders has been as follows:

| | |
|---|---|
| Interest upon the outstanding consolidated mortgage bonds of the Manhattan Railway Company | $1,627,320.00 |
| Interest upon second mortgage bonds of the Manhattan Railway Company | 180,920.00 |
| Cash rental | 50,000.00 |
| 7% dividend rental on non-participating stock | 304,570.00 |
| | $2,162,810.00 |

XVI. The rental payable under said lease and Readjustment Plan is less than the amount which should be received by petitioner as fair compensation for the use of the properties of the Manhattan Company.

*American Brake Shoe Record.*
*Petition of Manhattan Receiver Re Interest.*

XVII. In any event, the Receivers of the Interborough Rapid Transit Company should protect the Manhattan Company and its stockholders from the consequences of the default which has been permitted to exist under the mortgages of the Manhattan Company and pay the interest upon the first mortgage bonds of the Manhattan Company due on October 1, 1932, and the taxes that have been assessed against the Manhattan Company and are now due, and perform such other obligations as may rest upon the Manhattan Company subject to the further order of the Court.

WHEREFORE, petitioner asks for an order directing the Receivers of Interborough Rapid Transit Company to pay on October 1, 1932, the interest due upon the first mortgage bonds of Manhattan Railway Company and that the Receivers pay the taxes which are due and payable with respect to the properties of the Manhattan Railway Company at the present time, without prejudice to any subsequent application by petitioner for other and further relief in the premises and that the petitioner have such other and further relief as may seem to the Court just and proper.

WILLIAM ROBERTS,
Receiver of Manhattan Railway Company,
Petitioner.

HUGHES, SCHURMAN & DWIGHT,
Solicitors for Petitioner,
100 Broadway,
New York City.

**Answer of Committee for Interborough Rapid Transit Company Ten-Year Six Per Cent. Gold Notes to Petition by Receiver of Manhattan Railway Company.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

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| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, as a Committee for the protection of the holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company, the defendant herein, intervenors as parties in this suit, for answer to the petition of William Roberts, Receiver of Manhattan Railway Company, verified September 28, 1932, respectfully show to the Court:

FIRST: Your intervenors intervened in this cause pursuant to an order of this Court filed September 2, 1932. Your intervenors are acting as a Committee for the protection of the holders of the said Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, of the above named defendant, and as such Committee represent the holders

of a substantial amount of said notes. Said notes mature by their terms on October 1, 1932, and upon that date a semi-annual installment of interest in the amount of $315,000 becomes due. Upon information and belief no provision has been made for the payment thereof or of any part thereof.

SECOND: Your intervenors on information and belief admit the allegations contained in paragraphs numbered I, II, III, IV, V and XIV of said petition.

THIRD: Your intervenors are without knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs numbered VI, VIII, X, XI, XII and XIII of said petition.

FOURTH: Your intervenors are without knowedge or information sufficient to form a belief as to any of the allegations contained in paragraph numbered VII of said petition except that your intervenors admit that the properties of the Manhattan Railway Company which are subject to the lease made by Manhattan Railway Company to the Interborough Rapid Transit Company for the term of 999 years from November 1, 1875, are in the possession of the Receivers of Interborough Rapid Transit Company.

FIFTH: Your intervenors are without knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph numbered IX of said petition except that your intervenors admit that the income of the Interborough Rapid Transit Company and of the Receivers thereof from the operation of rapid transit railroads in the City of New York is derived principally from the subway division.

SIXTH: Your intervenors on information and belief admit the allegations contained in paragraph XV of said

petition except that they deny that the Manhattan Railway Company was a party to the Readjustment Plan of 1922.

SEVENTH: Your intervenors deny each and every allegation contained in paragraphs XVI and XVII of said petition.

WHEREFORE, your intervenors respectfully pray that said petition of William Roberts, as Receiver of Manhattan Railway Company, be in all respects denied.

CHARLES HAYDEN,
EARLE BAILIE,
GRAYSON M.-P. MURPHY,
ALBERT H. WIGGIN and
WILLIS D. WOOD,
Constituting a Committee for the protection of the holders of Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, of Interborough Rapid Transit Company,
By CHARLES HAYDEN,
Chairman.

ROOT, CLARK & BUCKNER,
Solicitors for Intervenors,
31 Nassau Street,
New York City.

Doc. 38

## Answer of Committee for Interborough Rapid Transit Company Ten-Year Six Per Cent. Gold Notes to Receivers' Petition for Instructions.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

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|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, as a Committee for the protection of the holders of Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, of Interborough Rapid Transit Company, the defendant herein, intervenors as parties in this suit, for answer to the petition of Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, verified September 28, 1932, respectfully show to the Court:

FIRST: Your intervenors intervened in this cause pursuant to an order of this Court filed September 2, 1932. Your intervenors are acting as a Committee for the protection of the holders of the said Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, of the above named defendant, and as such Committee represent the holders

of a substantial amount of said notes. Said notes mature by their terms on October 1, 1932, and upon that date a semi-annual installment of interest in the amount of $315,000 becomes due. Upon information and belief no provision has been made for the payment thereof or of any part thereof.

SECOND: Your intervenors admit on information and belief all the allegations contained in said petition, except that your intervenors are without knowledge or information sufficient to form a belief as to the accuracy of the figures set forth in paragraphs numbered 9, 12, 12-a, 12-b and 12-c of the said petition.

WHEREFORE, your intervenors join in the prayer of said Receivers.

CHARLES HAYDEN,
EARLE BAILIE,
GRAYSON M.-P. MURPHY,
ALBERT H. WIGGIN and
WILLIS D. WOOD,
Constituting a Committee for the protection of the holders of Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, of Interborough Rapid Transit Company,
By CHARLES HAYDEN,
Chairman.

ROOT, CLARK & BUCKNER,
Solicitors for Intervenors,
31 Nassau Street,
New York City.

Doc. 39

## Answer of Trustee of the Interborough Mortgage to the Petition of the Manhattan Receiver Verified September 28, 1932.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

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| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, IN EQUITY SITTING:

GUARANTY TRUST COMPANY OF NEW YORK (hereinafter sometimes called the "Trustee") as Trustee of the First and Refunding Mortgage (hereinafter sometimes called the "Interborough Mortgage") of Interborough Rapid Transit Company (hereinafter sometimes called the "Interborough") dated March 20, 1913, being a party to the above entitled cause and being concerned with the issues raised by the petition (hereinafter sometimes called the "Manhattan Petition") of William Roberts, as Receiver (hereinafter sometimes called the "Manhattan Receiver") of Manhattan Railway Company (hereinafter sometimes called the "Manhattan") verified and filed herein on September 28, 1932, for its answer respectfully shows:

1. The Trustee admits the allegations contained in the paragraphs of the Manhattan Petition numbered I to III,

both inclusive, but for the precise terms, provisions and conditions of the indentures referred to in the paragraph numbered III, it prays leave to refer to true copies thereof as and when the same are produced upon the hearing upon the Manhattan Petition.

2. The Trustee is without knowledge as to the allegations contained in the paragraphs numbered IV, V, VI, VII, VIII, IX and X of the Manhattan Petition.

3. The Trustee is without knowledge as to the allegations contained in the paragraph numbered XI of the Manhattan Petition, except that it admits that a substantial investment has been made by the Interborough upon properties included in the Manhattan Division, but the exact amount of such investment is unknown to the Trustee.

4. The Trustee is without knowledge as to the allegations contained in the paragraph numbered XII of the Manhattan Petition.

5. The Trustee is without knowledge as to the allegations contained in the paragraph numbered XIII of the Manhattan Petition, except it admits that an agreement was made by Interborough with the City of New York in 1913, but for the precise terms, provisions and conditions of the agreement referred to in said paragraph, it prays leave to refer to a true copy thereof as and when the same shall be produced upon the hearing upon the Manhattan Petition.

6. The Trustee is without knowledge as to the allegations contained in the paragraph numbered XIV of the Manhattan Petition.

7. The Trustee is without knowledge as to the allegations contained in the paragraph numbered XV of the

Manhattan Petition, except it admits that a Readjustment Plan was entered into in 1922 between the Interborough and some of the holders of the capital stock of the Manhattan, but for the precise terms, provisions and conditions of the Readjustment Plan of 1922 it prays leave to refer to a true copy thereof when the same is produced upon the hearing upon the Manhattan Petition.

8. The Trustee is without knowledge as to the allegations contained in the paragraphs numbered XVI and XVII of the Manhattan Petition.

WHEREUPON the Trustee, having answered the Manhattan Petition, affirmatively alleges as follows:

I. On or about March 20, 1913, the Interborough made, executed and delivered to this respondent its First and Refunding Mortgage, dated March 20, 1913, securing $300,000,000 5% Gold Bonds (hereinafter sometimes called the "5% Bonds") dated January 1, 1913, and that there are now outstanding in the hands of the public $132,228,000 principal amount of 5% Bonds, and $54,989,000 principal amount of 5% Bonds are pledged as security for the Ten-Year Secured Convertible 7% Gold Notes (hereinafter sometimes called the "7% Notes") of the Interborough, which 7% Notes matured on September 1, 1932. That the 5% Bonds and the 7% Notes are in the hands of numerous *bona fide* holders for value. That a true copy of the Interborough Mortgage is hereto annexed, marked Schedule 1 and made a part hereof with the same force and effect as if herein set forth at length.

II. That included in the properties subject to the lien of the Interborough Mortgage and pledged thereunder is the Manhattan lease. The Trustee has certified and the Interborough has sold substantial amounts of 5% Bonds as against expenditures upon the properties covered by the Manhattan lease and other appurtenant property for use in connection therewith.

III. As set out in the Interborough Mortgage (Schedule 1 hereto annexed) it is provided in Section 2 of Article Five as follows:

"In case (A) of the happening of one or more of the following events, hereinafter (after the lapse of the times respectively specified in the following subdivisions) called the events of default, that is to say:

* * * * * * * * *

(*g*) Default in the payment of the rent reserved, or in any other payment required to be made, in the lease to the Interborough Company from Manhattan Railway Company, dated January 1, 1903, or in any agreement amendatory thereof or supplemental thereto, or in the performance of any other condition in said lease contained (the breach of which condition by the terms of said lease shall expose the Interborough Company to forfeiture or re-entry), or in the payment of the interest upon any bonds of the Manhattan Railway Company hereafter issued with the consent of the Interborough Company—any of which defaults shall have continued for the period of sixty days after written notice thereof from said Manhattan Railway Company or from the Trustee hereunder; *provided* that in good faith the existence of such default shall not be contested by the Interborough Company.

(*h*) Default in the payment of any installment of the rent reserved, or in any other payment required to be made under the aforesaid Interborough Certificate, or the aforesaid Mnahattan Certificate, of the Public Service Commission of the First District, or default in any other of the provisions or conditions of either such certificate—any of which

defaults by the terms of such cretificate, respectively, shall expose the Interborough Company to forfeiture or re-entry by the City of New York, and any of which defaults shall have continued for the period of sixty days after notice of such default shall have been given to the Interborough Company by the Public Service Commission for the First District (or by any other body in which at the time of any such default the jurisdiction over the subject theretofore possessed by such Public Service Commission lawfully shall be vested); *provided* that the existence of such default shall not be in good faith contested by the Interborough Company;

(*i*) Default in the payment of any installment of rent reserved, or in any other payment required to be made, under any other certificate of the Public Service Commission for the First District in respect of any of the rapid transit railways covered by the aforesaid Contract No. 3, or the aforesaid Interborough Certificate, or the aforesaid Manhattan Certificate, or in respect of any other rapid transit railways on account of the construction or equipment of which bonds secured by this indenture shall have been certified and delivered, or any default in any of the conditions, provisions or covenants in any such contract or certificate, which default would expose the Interborough Company to forfeiture or re-entry, and such default shall have continued for the period of sixty days after notice of such default shall have been given to the Interborough Company by the Public Service Commission for the First District (or from any other body in which at the time of any such default the jurisdiction over the subject theretofore possessed by such Public Service Commission lawfully shall be vested); *provided* that in good faith the existence

of such default shall not be contested by the Interborough Company;

* * * * * * * * * *"

the Trustee may enter upon the property subject to the lien of the Mortgage and exercise all rights provided for in the Mortgage (Schedule 1 hereto annexed).

IV. That in and by the bill of complaint of The American Brake Shoe and Foundry Company filed herein on August 26, 1932, it was prayed that the rights of the plaintiff and of all creditors of the Interborough be ascertained and decreed and that the Court administer the properties and assets of the Interborough, and for such purpose marshal and administer such assets and ascertain the several and respective liens and priorities existing thereon and enforce by decree the rights, liens and equities of the creditors of the Interborough as the same might be finally ascertained and decreed by the Court.

V. That subsequent to the entry of the order appointing Receivers herein said Receivers entered upon the property and assets of the Interborough and have since managed and operated the same and have received the tolls, earnings, income and rents thereof.

VI. That the earnings of the Manhattan Division, as more fully set forth in the answer of the Interborough Receivers to the Manhattan Petition, include the earnings of the following four lines of railroads owned by Interborough described as:

(1) The Webster Avenue Line;

(2) The Eighth Avenue and 162nd Street Connection;

(3) The Queensborough Bridge Line; and

(4) The West Farms Subway Connection.

VII. That in and by the lease dated January 1, 1903 (a copy of which is annexed as Exhibit (1) to the Petition verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer), between the Manhattan and the Intrborough it was provided in Article Fourteenth that upon the expiration of such lease or upon any sooner termination thereof, all property, extensions, branches, additions, improvements and equipments constructed, made or furnished for or in connection with the Manhattan Division by the Interborough out of its own funds should become the property of the Manhattan upon the payment by the Manhattan of the reasonable value thereof and that in and by the agreement dated March 15, 1913 (a copy of which is annexed as Exhibit (3) to the petition verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer), between the Manhattan and the Interborough it was provided in Article Sixth thereof that in case of the termination of the lease for any cause and if the Manhattan should be under obligation or should elect under the terms of Article Fourteenth of the agreement of lease dated January 1, 1903, to pay the Interborough the reasonable value of the property, extensions, branches, additions, improvements and equipments constructed, made or furnished by the Interborough out of its own funds, such payment with interest thereon at the rate of 5% from the time of taking possession by the Manhattan should be made by the Manhattan within eighteen months after the date upon which it should give notice of its election to terminate the lease under the provisions of Article Twenty-first of the agreement of lease dated January 1, 1903, and the terms of the agreement of March 15, 1913.

VIII. That in the event of the termination of the Manhattan lease, the Manhattan would be obligated in accordance with the lease agreements dated January 1,

1903, and March 15, 1913, respectively, to make payment to the Interborough for the third tracking of the Second, Third and Ninth Avenue Lines and, also, for the power plants. Pending such payment the rights of the Interborough Receivers and the creditors of the Interborough in and to the earnings of the Manhattan Division allocable to the four lines mentioned in paragraph VI hereof, the third tracking and power plants should be safeguarded and protected by this Court.

IX. That upon information and belief various claims will be asserted against the Interborough Receivers and the Interborough property on account of supplies and materials furnished to the Interborough and that priority of payment of such claims will be asserted.

X. That until the claim, if any, of the Manhattan against the Interborough Receivers and its property is established and its character and priority determined, the payments prayed for in the Manhattan Petition cannot properly be made by this Court.

XI. That pending a final accounting and a determination of the respective rights and priorities of the creditors of the Interborough, the Trustee is advised that it is inadvisable to make payments to particular creditors or classes of creditors.

WHEREFORE, the Trustee, having answered the Manhattan Petition, prays that in any decree entered by this Court upon the Manhattan Petition, the Court will take a just and true account of the matters aforesaid as justice and equity may require and that in any decree which may be entered herein proper provision be made and conditions laid down and required for the safeguarding and protection of the rights of the Trustee and the holders of the 5% Bonds and that the Trustee and the holders of the 5%

1156 *American Brake Shoe Record.*
*Answer of Trustee of I. R. T. Mortgage to Petition.*

Bonds may have such other and further relief in the premises as the nature and circumstances of the case might require and as to this Court may seem meet.

Dated, October 1, 1932.

GUARANTY TRUST COMPANY OF NEW YORK,
As Trustee of the First and Refunding Mortgage of Interborough Rapid Transit Company dated March 20, 1913,
By GEORGE C. CUTLER,
Vice-President.

1157 (Corporate Seal)

Attest:

F. H. KUHN,
Assistant Secretary.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for Guaranty Trust Company of New York, as Trustee aforesaid,
Office and Post Office Address:
15 Broad Street,
Borough of Manhattan,
City of New York.

1158 EDWIN S. S. SUNDERLAND,
THOMAS O'G. FITZGIBBON,
of Counsel.

Doc. 40

## Answer of Trustee of the Interborough Mortgage to the Petition of the Interborough Receivers Verified September 28, 1932.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, IN EQUITY SITTING:

GUARANTY TRUST COMPANY OF NEW YORK (hereinafter sometimes called the "Trustee") as Trustee of the First and Refunding Mortgage (hereinafter sometimes called the "Interborough Mortgage") of Interborough Rapid Transit Company (hereinafter sometimes called the "Interborough") dated March 20, 1913, by order of this Court, made and entered in the above entitled cause on September 28, 1932, having been made a party to the above entitled cause, pursuant to said order does hereby file its answer to the petition (hereinafter sometimes called the "Petition") of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers (hereinafter sometimes called the "Receivers") of the Interborough, verified and filed herein on September 28, 1932,

files its appearance in this cause, and for its answer respectfully shows:

I. The Trustee admits the allegations contained in paragraphs numbered 1 to 8, inclusive, of the Petition, but for the precise terms, provisions and conditions of the documents referred to in said paragraphs, it prays leave to refer to true copies thereof when the same are produced upon the hearing upon the Petition.

II. The Trustee is without knowledge as to the allegations contained in the paragraphs numbered 9 to 13, in-
163 clusive, of the Petition.

III. With respect to the allegations contained in the paragraph numbered 14 of the Petition, the Trustee prays leave to refer to a true copy of the Manhattan lease when the same is produced upon the hearing upon the Petition.

IV. The Trustee admits the allegations contained in the paragraphs numbered 15 and 16 of the Petition.

V. The Trustee is without knowledge as to the allegations contained in the paragraph numbered 17 of the Petition.

WHEREUPON the Trustee, having answered the Petition,
164 affirmatively alleges as follows:

1. On or about March 20, 1913, the Interborough made, executed and delivered to this respondent its First and Refunding Mortgage dated March 20, 1913, securing $300,000,000 5% Gold Bonds (hereinafter sometimes called the "5% Bonds") dated January 1, 1913, and that there are now outstanding in the hands of the public $132,228,000 principal amount of 5% Bonds, and $54,989,000 principal amount of 5% Bonds are pledged as security for the Ten-Year Secured Convertible 7% Gold Notes (hereinafter

sometimes called the "7% Notes") of the Interborough, which 7% Notes matured on September 1, 1932. That the 5% Bonds and the 7% Notes are in the hands of numerous *bona fide* holders for value. That a true copy of the Interborough Mortgage is hereto annexed, marked Schedule 1 and made a part hereof with the same force and effect as if herein set forth at length.

2. That included in the properties subject to the lien of the Interborough Mortgage and pledged thereunder is the Manhattan lease. The Trustee has certified and the Interborough has sold substantial amounts of 5% Bonds as against expenditures upon the properties covered by the Manhattan lease and other appurtenant property for use in connection therewith.

3. As set out in the Interborough Mortgage (Schedule 1 hereto annexed) it is provided in Section 2 of Article Five as follows:

> "In case (A) of the happening of one or more of the following events, hereinafter (after the lapse of the times respectively specified in the following subdivisions) called the events of default, that is to say:
>
> * * * * * * * * *
>
> (*g*) Default in the payment of the rent reserved, or in any other payment required to be made, in the lease to the Interborough Company from Manhattan Railway Company, dated January 1, 1903, or in any agreement amendatory thereof or supplemental thereto, or in the performance of any other condition in said lease contained (the breach of which condition by the terms of said lease shall expose the Interborough Company to forfeiture or re-entry), or in the payment of the interest upon any bonds of the Manhattan Railway Company hereafter issued with the consent of the Interborough Com-

pany,—any of which defaults shall have continued for the period of sixty days after written notice thereof from said Manhattan Railway Company or from the Trustee hereunder; *provided* that in good faith the existence of such default shall not be contested by the Interborough Company;

(*h*) Default in the payment of any installment of the rent reserved, or in any other payment required to be made under the aforesaid Interborough Certificate, or the aforesaid Manhattan Certificate, of the Public Service Commission of the First District, or default in any other of the provisions or conditions of either such certificate,—any of which defaults by the terms of such certificate, respectively, shall expose the Interborough Company to forfeiture or re-entry by the City of New York, and any of which defaults shall have continued for the period of sixty days after notice of such default shall have been given to the Interborough Company by the Public Service Commission for the First District (or by any other body in which at the time of any such default the jurisdiction over the subject theretofore possessed by such Public Service Commission lawfully shall be vested); *provided* that the existence of such default shall not be in good faith contested by the Interborough Company;

(*i*) Default in the payment of any installment of rent reserved, or in any other payment required to be made, under any other certificate of the Public Service Commission for the First District in respect of any of the rapid transit railways covered by the aforesaid Contract No. 3, or the aforesaid Interborough Certificate, or the aforesaid Manhattan Certificate, or in respect of any other rapid transit railways on account of the construction or equipment of which bonds secured by this indenture

shall have been certified and delivered, or any default in any of the conditions, provisions or covenants in any such contract or certificate, which default would expose the Interborough Company to forfeiture or re-entry, and such default shall have continued for the period of sixty days after notice of such default shall have been given to the Interborough Company by the Public Service Commission for the First District (or from any other body in which at the time of any such default the jurisdiction over the subject theretofore possessed by such Public Service Commission lawfully shall be vested); *provided* that in good faith the existence of such default shall not be contested by the Interborough Company;

* * * * * * * * *"

the Trustee may enter upon the property subject to the lien of the Mortgage and exercise all rights provided for in the Mortgage (Schedule 1 hereto annexed).

4. That in and by the bill of complaint of The American Brake Shoe and Foundry Company filed herein on August 26, 1932, it was prayed that the rights of the plaintiff and of all creditors of the Interborough be ascertained and decreed and that the Court administer the properties and assets of the Interborough and for such purpose marshal and administer such assets and ascertain the several and respective liens and priorities existing thereon and enforce by decree the rights, liens and equities of the creditors of the Interborough as the same might be finally ascertained and decreed by the Court.

5. That subsequent to the entry of the order appointing Receivers herein said Receivers entered upon the property and assets of the Interborough and have since managed and operated the same and have received the tolls, earnings, income and rents thereof.

6. That the earnings of the Manhattan Division, as more fully set forth in the answer of the Interborough Receivers to the Manhattan Petition, include the earnings of the following four lines of railroads owned by Interborough described as:

(1) The Webster Avenue Line;

(2) The Eighth Avenue and 162nd Street Connection;

(3) The Queensborough Bridge Line; and

(4) The West Farms Subway Connection.

7. That in and by the lease dated January 1, 1903, (a copy of which is annexed as Exhibit (1) to the Petition verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer) between the Manhattan and the Interborough it was provided in Article Fourteenth that upon the expiration of such lease or upon any sooner termination thereof, all property, extensions, branches, additions, improvements and equipments constructed, made or furnished for or in connection with the Manhattan Division by the Interborough out of its own funds should become the property of the Manhattan upon the payment by the Manhattan of the reasonable value thereof and that in and by the agreement dated March 15, 1913, (a copy of which is annexed as Exhibit (3) to the Petition verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer) between the Manhattan and the Interborough it was provided in Article Sixth thereof that in case of the termination of the lease for any cause and if the Manhattan should be under obligation or should elect under the terms of Article Fourteenth of the agreement of lease dated January 1, 1903, to pay the Interborough the reasonable value of the property, extensions, branches, additions, improvements and equipments constructed, made

or furnished by the Interborough out of its own funds, such payment with interest thereon at the rate of 5% from the time of taking possession by the Manhattan should be made by the Manhattan within eighteen months after the date upon which it should give notice of its election to terminate the lease under the provisions of Article Twenty-first of the agreement of lease dated January 1, 1903, and the terms of the agreement of March 15, 1913.

8. That in the event of the termination of the Manhattan Lease, the Manhattan would be obligated in accordance with the lease agreements dated January 1, 1903 and March 15, 1913, respectively, to make payment to the Interborough for the third tracking of the Second, Third and Ninth Avenue Lines and, also, for the power plants. Pending such payment the rights of the Interborough Receivers and the creditors of the Interborough in and to the earnings of the Manhattan Division allocable to the four lines mentioned in paragraph 6 hereof, the third tracking and power plants should be safeguarded and protected by this Court.

9. That upon information and belief various claims will be asserted against the Interborough Receivers and the Interborough property on account of supplies and materials furnished to the Interborough and that priority of payment of such claims will be asserted.

10. That until the claim, if any, of the Manhattan against the Interborough Receivers and its property is established and its character and priority determined, the payments referred to in the Petition cannot properly be made by this Court.

11. That pending a final accounting and a determination of the respective rights and priorities of the creditors of the Interborough, the Trustee is advised that it is in-

advisable to make payments to particular creditors or classes of creditors.

WHEREFORE, the Trustee, having answered the Interborough Petition, prays that in any decree entered by this Court upon the Interborough Petition, the Court will take a just and true account of the matters aforesaid as justice and equity may require and that in any decree which may be entered herein proper provision be made and conditions laid down and required for the safeguarding and protection of the rights of the Trustee and the holders of the 5% Bonds and that the Trustee and the holders of the 5% Bonds may have such other and further relief in the premises as the nature and circumstances of the case might require and as to this Court may seem meet.

Dated, October 1, 1932.

GUARANTY TRUST COMPANY OF NEW YORK,
As Trustee of the First and Refunding Mortgage of Interborough Rapid Transit Company dated March 20, 1913,
By GEORGE C. CUTLER,
Vice-President.

(Corporate Seal)

Attest:
F. H. KUHN,
Assistant Secretary.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for Guaranty Trust Company of New York, as Trustee as aforesaid,
Office and Post Office Address:
15 Broad Street,
Borough of Manhattan,
City of New York.

EDWIN S. S. SUNDERLAND,
THOMAS O'G. FITZGIBBON,
of Counsel.

Doc. 41

## Answer of Committee Representing Interborough 5% Gold Bonds to Petition of the Manhattan Receiver Verified September 28, 1932.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, IN EQUITY SITTING:

J. P. MORGAN, Chairman, A. M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY, and CHARLES E. MITCHELL (hereinafter collectively called the "Committee"), constituted and acting as a Committee under the Deposit Agreement (hereinafter sometimes called the "5% Bonds Deposit Agreement") dated as of August 31, 1932, with respect to Interborough Rapid Transit Company (hereinafter sometimes called the "Interborough") First and Refunding Mortgage 5% Gold Bonds (hereinafter sometimes called the "5% Bonds"), being a party to the above entitled cause and being concerned with the issues raised by the petition (hereinafter sometimes called the "Manhattan Petition") of William Roberts, as Receiver

(hereinafter sometimes called the "Manhattan Receiver") of Manhattan Railway Company (hereinafter sometimes called the "Manhattan") verified and filed herein on September 28, 1932, for its answer respectfully shows:

1. It admits the allegations contained in the paragraphs of the Manhattan Petition numbered I to III, both inclusive, but for the precise terms, provisions and conditions of the indentures referred to in the paragraph numbered III, it prays leave to refer to true copies thereof as and when the same are produced upon the hearing upon the Manhattan Petition.

187 2. It is without knowledge as to the allegations contained in the paragraphs numbered IV, V, VI, VII, VIII, IX and X of the Manhattan Petition.

3. It is without knowledge as to the allegations contained in the paragraph numbered XI of the Manhattan Petition, except that it admits that a substantial investment has been made by the Interborough upon properties included in the Manhattan Division, but the exact amount of such investment is unknown to the Committee.

4. It is without knowledge as to the allegations contained in the paragraph numbered XII of the Manhattan Petition.

188 5. It is without knowledge as to the allegations contained in the paragraph numbered XIII of the Manhattan Petition, except it admits that an agreement was made by Interborough with the City of New York in 1913, but for the precise terms, provisions and conditions of the agreement referred to in said paragraph, it prays leave to refer to a true copy thereof as and when the same shall be produced upon the hearing upon the Manhattan Petition.

6. It is without knowledge as to the allegations contained in the paragraph numbered XIV of the Manhattan Petition.

7. It is without knowledge as to the allegations contained in the paragraph numbered XV of the Manhattan Petition, except it admits that a Readjustment Plan was entered into in 1922 between the Interborough and some of the holders of the capital stock of the Manhattan but for the precise terms, provisions and conditions of the Readjustment Plan of 1922 it prays leave to refer to a true copy thereof when the same is produced upon the hearing upon the Manhattan Petition.

8. It is without knowledge as to the allegations contained in the paragraphs numbered XVI and XVII of the Manhattan Petition.

WHEREUPON the Committee, having answered the Manhattan Petition, affirmatively alleges as follows:

I. That the Committee by order of this Court was permitted to intervene as a party defendant to the above entitled cause.

II. That the Committee holds a substantial amount of the 5% Bonds under the 5% Bonds Deposit Agreement and that such 5% Bonds are the valid and enforceable obligations of the Interborough.

III. That in and by the bill of complaint of The American Brake Shoe and Foundry Company filed herein on August 26, 1932, it was prayed that the rights of the plaintiff and of all creditors of the Interborough be ascertained and decreed and that the Court administer the properties and assets of the Interborough and for such purpose marshal and administer such assets and ascertain the several and respective liens and priorities existing thereon and enforce by decree the rights, liens and equities of the creditors of the Interborough as the same might be finally ascertained and decreed by the Court.

IV. That subsequent to the entry of the order appointing Receivers herein said Receivers entered upon the prop-

192 erty and assets of the Interborough and have since managed and operated the same and have received the tolls, earnings, income and rents thereof.

V. That the earnings of the Manhattan Division, as more fully set forth in the answer of the Interborough Receivers to the Manhattan Petition, include the earnings of the following lines owned by Interborough:

1. The Webster Avenue Line;

2. The Eighth Avenue and 162nd Street Connection;

193 3. The Queensborough Bridge Line; and

4. The West Farms Subway Connection.

VI. That in and by the lease dated January 1, 1903 (a copy of which is annexed as Exhibit 1 to the Petition verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer) between the Manhattan and the Interborough it was provided in Article Fourteenth that upon the expiration of such lease or upon any sooner termination thereof, all property, extensions, branches, additions, improvements and equipments constructed, made or furnished for or in connection with the Manhattan Division by the Interborough out of its own funds should become the property of the Manhattan
194 upon the payment by the Manhattan of the reasonable value thereof and that in and by the Agreement dated March 15, 1913, (a copy of which is annexed as Exhibit 3 to the Petition verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer) between the Manhattan and the Interborough it was provided in Article Sixth thereof that in case of the termination of the lease for any cause, and if the Manhattan should be under obligation, or should elect, under the terms of Article Fourteenth of the Agreement of lease dated January 1, 1903, to pay the Interborough the reason-

able value of the property, extensions, branches, additions, improvements and equipments constructed, made or furnished by the Interborough out of its own funds, such payment with interest thereon at the rate of 5% from the time of taking possession by the Manhattan should be made by the Manhattan within eighteen months after the date upon which it should give notice of its election to terminate the lease under the provisions of Article Twenty-first of the agreement of lease dated January 1, 1903, and the terms of the agreement of March 15, 1913.

VII. That in the event of the termination of the Manhattan lease, the Manhattan would be obligated in accordance with the lease agreements dated January 1, 1903 and March 15, 1913, respectively, to make payment to the Interborough for the third tracking of the Second, Third and Ninth Avenue Lines and, also, for the power plants. Pending such payment the rights of the Interborough Receivers and the creditors of the Interborough in and to the earnings of the Manhattan Division allocable to the four lines mentioned in paragraph V hereof, the third tracking, and power plants should be safeguarded and protected by this Court.

VIII. That upon information and belief various claims will be asserted against the Interborough Receivers and the Interborough property on account of supplies and materials furnished to the Interborough and that priority of payment of such claims will be asserted.

IX. That until the claim, if any, of the Manhattan against the Interborough Receivers and its property is established and its character and priority determined, the payments prayed for in the Manhattan Petition cannot properly be made by this Court.

X. That pending a final accounting and a determination of the respective rights and priorities of the creditors of the Interborough, the Committee is advised that it is in-

advisable to make payments to particular creditors or classes of creditors.

WHEREFORE, the Committee, having answered the Manhattan Petition, prays that in any decree entered by this Court upon the Manhattan Petition, the Court will take a just and true account of the matters aforesaid as justice and equity may require and that in any decree which may be entered herein proper provision be made and conditions laid down and required for the safeguarding and protection of the rights of the Committee and the holders of the 5% Bonds and that the Committee and the holders
1199 of the 5% Bonds may have such other and further relief in the premises as the nature and circumstances of the case might require and as to this Court may seem meet.

Dated, October 1, 1932.

J. P. MORGAN, Chairman,
A. M. ANDERSON,
FREDERIC W. ALLEN,
GEORGE F. BAKER,
EDWARD D. DUFFIELD,
F. H. ECKER,
HALSTEAD G. FREEMAN,
DARWIN P. KINGSLEY,
1200 G. HERMANN KINNICUTT,
H. C. MCELDOWNEY, and
CHARLES E. MITCHELL,

Constituted and acting as a Committee under the Deposit Agreement dated as of August 31, 1932, with respect to Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, and not individually, by

ARTHUR M. ANDERSON.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for the Committee above mentioned,
Office and Post Office Address:
15 Broad Street,
Borough of Manhattan,
City of New York.

EDWIN S. S. SUNDERLAND,
THOMAS O'G. FITZGIBBON,
Of Counsel.

204 Doc. 42

**Answer of Committee Representing Interborough Ten-Year Secured Convertible 7% Gold Notes to Petition of the Manhattan Receiver Verified September 28, 1932.**

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, | |
| 205 against | In Equity E 70-364 |
| INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | |

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, IN EQUITY SITTING:

J. P. MORGAN, Chairman, A. M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY, and CHARLES E. MITCHELL (hereinafter collectively called the "Com-
1206 mittee"), constituted and acting as a Committee under the Deposit Agreement (hereinafter sometimes called the "7% Notes Deposit Agreement") dated as of July 19, 1932, with respect to Interborough Rapid Transit Company (hereinafter sometimes called the "Interborough") Ten-Year Secured Convertible 7% Gold Notes (hereinafter sometimes called the "7% Notes"), being a party to the above entitled cause and being concerned with the

issues raised by the petition (hereinafter sometimes called the "Manhattan Petition") of William Roberts, as Receiver (hereinafter sometimes called the "Manhattan Receiver") of Manhattan Railway Company (hereinafter sometimes called the "Manhattan") verified and filed herein on September 28, 1932, for its answer respectfully shows:

1. It admits the allegations contained in the paragraphs of the Manhattan Petition numbered I to III, both inclusive, but for the precise terms, provisions and conditions of the indentures referred to in the paragraph numbered III, it prays leave to refer to true copies thereof as and when the same are produced upon the hearing upon the Manhattan Petition.

2. It is without knowledge as to the allegations contained in the paragraphs numbered IV, V, VI, VII, VIII, IX and X of the Manhattan Petition.

3. It is without knowledge as to the allegations contained in the paragraph numbered XI of the Manhattan Petition, except it admits that a substantial investment has been made by the Interborough upon properties included in the Manhattan Division, but the exact amount of such investment is unknown to the Committee.

4. It is without knowledge as to the allegations contained in the paragraph numbered XII of the Manhattan Petition.

5. It is without knowledge as to the allegations contained in the paragraph numbered XIII of the Manhattan Petition, except it admits that an agreement was made by Interborough with the City of New York in 1913, but for the precise terms, provisions and conditions of the agreement referred to in said paragraph, it prays leave to refer to a true copy thereof as and when the same shall be produced upon the hearing upon the Manhattan Petition.

210 *American Brake Shoe Record.*
*Answer of I. R. T. 7% Note Committee to Petition.*

6. It is without knowledge as to the allegations contained in the paragraph numbered XIV of the Manhattan Petition.

7. It is without knowledge as to the allegations contained in the paragraph numbered XV of the Manhattan Petition, except it admits that a Readjustment Plan was entered into in 1922 between the Interborough and some of the holders of the capital stock of the Manhattan, but for the precise terms, provisions and conditions of the Readjustment Plan of 1922 it prays leave to refer to a true copy thereof when the same is produced upon the hearing
1211 upon the Manhattan Petition.

8. It is without knowledge as to the allegations contained in the paragraphs numbered XVI and XVII of the Manhattan Petition.

WHEREUPON the Committee, having answered the Manhattan Petition, affirmatively alleges, as follows:

I. That the Committee by order of this Court was permitted to intervene as a party defendant to the above entitled cause.

II. That the Committee holds a substantial amount of the 7% Notes under the 7% Notes Deposit Agreement and that such 7% Notes are the valid and enforceable
1212 obligations of the Interborough.

III. That in and by the bill of complaint of the American Brake Shoe and Foundry Company filed herein on August 26, 1932, it was prayed that the rights of the plaintiff and of all creditors of the Interborough be ascertained and decreed and that the Court administer the properties and assets of the Interborough and for such purpose marshal and administer such assets and ascertain the several and respective liens and priorities existing thereon and enforce by decree the rights, liens and equities

of the creditors of the Interborough as the same might be finally ascertained and decreed by the Court.

IV. That subsequent to the entry of the order appointing Receivers herein said Receivers entered upon the property and assets of the Interborough and have since managed and operated the same and have received the tolls, earnings, income and rents thereof.

V. That the earnings of the Manhattan Division, as more fully set forth in the answer of the Interborough Receivers to the Manhattan Petition, include the earnings of the following lines owned by Interborough: 12

1. The Webster Avenue Line;

2. The Eighth Avenue and 162nd Street Connection;

3. The Queensborough Bridge Line; and

4. The West Farms Subway Connection.

VI. That in and by the lease dated January 1, 1903, (a copy of which is annexed as Exhibit 1 to the Petition verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer) between the Manhattan and the Interborough it was provided in Article Fourteenth that upon the expiration of such lease or upon any sooner termination thereof, all property, extensions, branches, additions, improvements and equipments constructed, made or furnished for or in connection with the Manhattan Division by the Interborough out of its own funds should become the property of the Manhattan upon the payment by the Manhattan of the reasonable value thereof and that in and by the Agreement dated March 15, 1913, (a copy of which is annexed as Exhibit 3 to the Petition verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer) between the Manhattan and the Interborough it was provided in Article Sixth thereof that in 121

case of the termination of the lease for any cause, and if the Manhattan should be under obligation, or should elect, under the terms of Article Fourteenth of the agreement of lease dated January 1, 1903, to pay the Interborough the reasonable value of the property, extensions, branches, additions, improvements and equipments constructed, made or furnished by the Interborough out of its own funds, such payment with interest thereon at the rate of 5% from the time of taking possession by the Manhattan should be made by the Manhattan within eighteen months after the date upon which it should give notice of its election to terminate the lease under the
217 provisions of Article Twenty-first of the agreement of lease dated January 1, 1903, and the terms of the agreement of March 15, 1913.

VII. That in the event of the termination of the Manhattan lease, the Manhattan would be obligated in accordance with the lease agreements dated January 1, 1903 and March 15, 1913, respectively, to make payment to the Interborough for the third tracking of the Second, Third and Ninth Avenue Lines and, also, for the power plants. Pending such payments the rights of the Interborough Receivers and the creditors of the Interborough in and to the earnings of the Manhattan Division allocable to the four lines mentioned in paragraph V hereof, the third tracking, and power plants should be safeguarded and
218 protected by this Court.

VIII. That upon information and belief various claims will be asserted against the Interborough Receivers and the Interborough property on account of supplies and materials furnished to the Interborough and that priority of payment of such claims will be asserted.

IX. That until the claim, if any, of the Manhattan against the Interborough Receivers and its property is established and its character and priority determined, the payment prayed for in the Manhattan Petition cannot properly be made by this Court.

X. That pending a final accounting and a determination of the respective rights and priorities of the creditors of the Interborough, the Committee is advised that it is inadvisable to make payments to particular creditors or classes of creditors.

WHEREFORE, the Committee, having answered the Manhattan Petition, prays that in any decree entered by this Court upon the Manhattan Petition, the Court will take a just and true account of the matters aforesaid as justice and equity may require and that in any decree which may be entered herein proper provision be made and conditions laid down and required for the safeguarding and protection of the rights of the Committee and the holders of the 7% Notes and that the Committee and the holders of the 7% Notes may have such other and further relief in the premises as the nature and circumstances of the case might require and as to this Court may seem meet.

Dated, October 1, 1932.

J. P. MORGAN, Chairman,
A. M. ANDERSON,
FREDERIC W. ALLEN,
GEORGE F. BAKER,
EDWARD D. DUFFIELD,
F. H. ECKER,
HALSTEAD G. FREEMAN,
DARWIN P. KINGSLEY,
G. HERMANN KINNICUTT,
H. C. MCELDOWNEY, and
CHARLES E. MITCHELL,

Constituted and acting as a Committee under the Deposit Agreement dated as of July 19, 1932, with respect to Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, and not individually, by

ARTHUR M. ANDERSON

1222

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for the Committee above mentioned,
Office and Post Office Address:
15 Broad Street,
Borough of Manhattan,
City of New York.

EDWIN S. S. SUNDERLAND,
THOMAS O'G. FITZGIBBON,
Of Counsel.

1223

1224

Doc. 43

## Answer of Committee Representing Interborough 5% Gold Bonds to the Petition of the Interborough Receivers.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, IN EQUITY SITTING:

J. P. MORGAN, Chairman, A. M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY, and CHARLES E. MITCHELL (hereinafter collectively called the "Committee"), constituted and acting as a Committee under the Deposit Agreement (hereinafter sometimes called the "5% Bonds Deposit Agreement") dated as of August 31, 1932, with respect to Interborough Rapid Transit Company (hereinafter sometimes called the "Interborough") First and Refunding Mortgage 5% Gold Bonds (hereinafter sometimes called the "5% Bonds") pursuant to the order of this Court made and entered herein on September

28, 1932, as such Committee does hereby file its answer to the petition (hereinafter sometimes called the "Petition") of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers (hereinafter sometimes called the "Receivers") of the Interborough, verified and filed herein on September 28, 1932, and for its answer respectfully shows:

1. The Committee admits the allegations contained in paragraphs numbered 1 to 8, inclusive, of the Petition, but for the precise terms, provisions and conditions of the documents referred to in said paragraphs, it prays leave to refer to true copies thereof when the same are produced upon the hearing upon the Petition.

2. The Committee is without knowledge as to the allegations contained in the paragraphs numbered 9 to 13, inclusive, of the Petition.

3. With respect to the allegations contained in the paragraph numbered 14 of the Petition, the Committee prays leave to refer to a true copy of the Manhattan lease when the same is produced upon the hearing upon the Petition.

4. The Committee admits the allegations contained in the paragraphs numbered 15 and 16 of the Petition.

5. The Committee is without knowledge as to the allegations contained in the paragraph numbered 17 of the Petition.

WHEREUPON the Committee, having answered the Interborough Petition, affirmatively alleges as follows:

I. That the Committee by order of this Court was permitted to intervene as a party defendant to the above entitled cause.

II. That the Committee holds a substantial amount of the 5% Bonds under the 5% Bonds Deposit Agreement and

that such 5% Bonds are the valid and enforceable obligation of the Interborough.

III. That in and by the bill of complaint of The American Brake Shoe and Foundry Company filed herein on August 26, 1932, it was prayed that the rights of the plaintiff and of all creditors of the Interborough be ascertained and decreed and that the Court administer the properties and assets of the Interborough and for such purpose marshal and administer such assets and ascertain the several and respective liens and priorities existing thereon and enforce by decree the rights, liens and equities of the creditors of the Interborough as the same might be finally ascertained and decreed by the Court.

IV. That subsequent to the entry of the order appointing Receivers herein said Receivers entered upon the property and assets of the Interborough and have since managed and operated the same and have received the tolls, earnings, income and rents thereof.

V. That the earnings of the Manhattan Division, as more fully set forth in the answer of the Interborough Receivers to the Manhattan Petition, include the earnings of the following four lines of railroads owned by Interborough described as:

(1) The Webster Avenue Line;

(2) The Eighth Avenue and 162nd Street Connection;

(3) The Queensborough Bridge Line; and

(4) The West Farms Subway Connection.

VI. That in and by the lease dated January 1, 1903 (a copy of which is annexed as Exhibit (1) to the Petition verified September 28, 1932, of the Interborough Receivers,

and by this reference made a part of this answer) between the Manhattan and the Interborough it was provided in Article Fourteenth that upon the expiration of such lease or upon any sooner termination thereof, all property, extensions, branches, additions, improvements and equipment constructed, made or furnished for or in connection with the Manhattan Division by the Interborough out of its own funds should become the property of the Manhattan upon the payment by the Manhattan of the reasonable value thereof and that in and by the agreement dated March 15, 1913 (a copy of which is annexed as Exhibit (3) to the Petition verified September 28, 1932, of
235 the Interborough Receivers, and by this reference made a part of this answer) between the Manhattan and the Interborough it was provided in Article Sixth thereof that in case of the termination of the lease for any cause and if the Manhattan should be under obligation or should elect under the terms of Article Fourteenth of the agreement of lease dated January 1, 1903, to pay the Interborough the reasonable value of the property, extensions, branches, additions, improvements and equipment constructed, made or furnished by the Interborough out of its own funds, such payment with interest thereon at the rate of 5% from the time of taking possession by the Manhattan should be made by the Manhattan within eighteen months after the date upon which it should give notice
236 of its election to terminate the lease under the provisions of Article Twenty-first of the agreement of lease dated January 1, 1903, and the terms of the agreement of March 15, 1913.

VII. That in the event of the termination of the Manhattan lease, the Manhattan would be obligated in accordance with the lease agreements dated January 1, 1903, and March 15, 1913, respectively, to make payment to the Interborough for the third tracking of the Second, Third and

Ninth Avenue Lines and, also, for the power plants. Pending such payment the rights of the Interborough Receivers and the creditors of the Interborough in and to the earnings of the Manhattan Division allocable to the four lines mentioned in paragraph V hereof, the third tracking, and power plants should be safeguarded and protected by this Court.

VIII. That upon information and belief various claims will be asserted against the Interborough Receivers and the Interborough property on account of supplies and materials furnished to the Interborough and that priority of payment of such claims will be asserted.

IX. That until the claim, if any, of the Manhattan against the Interborough Receivers and its property is established and its character and priority determined, the payments referred to in the Petition cannot properly be made by this Court.

X. That pending a final accounting and a determination of the respective rights and priorities of the creditors of the Interborough, the Committee is advised that it is inadvisable to make payments to particular creditors or classes of creditors.

WHEREFORE, the Committee, having answered the Interborough Petition, prays that in any decree entered by this Court upon the Interborough Petition, the Court will take a just and true account of the matters aforesaid as justice and equity may require and that in any decree which may be entered herein proper provision be made and conditions laid down and required for the safeguarding and protection of the rights of the Committee and the holders of the 5% Bonds and that the Committee and the holders of the 5% Bonds may have such other and further relief in the

premises as the nature and circumstances of the case might require and as to this Court may seem meet.

Dated, October 1, 1932.

J. P. MORGAN, Chairman,
A. M. ANDERSON,
FREDERIC W. ALLEN,
GEORGE F. BAKER,
EDWARD D. DUFFIELD,
F. H. ECKER,
HALSTEAD G. FREEMAN,
DARWIN P. KINGSLEY,
G. HERMANN KINNICUTT,
H. C. MCELDOWNEY, and
CHARLES E. MITCHELL,

Constituted and acting as a Committee under the Deposit Agreement dated as of August 31, 1932, with respect to Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, and not individually, by

ARTHUR M. ANDERSON.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for the Committee above mentioned,
Office and Post Office Address,
15 Broad Street,
Borough of Manhattan,
City of New York.

EDWIN S. S. SUNDERLAND,
THOMAS O'G. FITZGIBBON,
of Counsel.

Doc. 44

**Answer of Committee Representing Interborough Ten-Year Secured Convertible 7% Gold Notes to the Petition of the Interborough Receivers Verified September 28, 1932.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

TO THE HONORABLE THE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, IN EQUITY SITTING:

J. P. MORGAN, Chairman, A. M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY, and CHARLES E. MITCHELL (hereinafter collectively called the "Committee"), constituted and acting as a Committee under the Deposit Agreement (hereinafter sometimes called the "7% Notes Deposit Agreement") dated as of July 19, 1932, with respect to Interborough Rapid Transit Company (hereinafter sometimes called the "Interborough") Ten-Year Secured Convertible 7% Gold Notes (hereinafter sometimes called the "7% Notes") pursuant to the order of this Court made and entered herein on

September 28, 1932, as such Committee does hereby file its answer to the petition (hereinafter sometimes called the "Petition") of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers (hereinafter sometimes called the "Receivers") of the Interborough, verified and filed herein on September 28, 1932, and for its answer respectfully shows:

1. The Committee admits the allegations contained in paragraphs numbered 1 to 8, inclusive, of the Petition, but for the precise terms, provisions and conditions of the documents referred to in said paragraphs, it prays leave to refer to true copies thereof when the same are produced upon the hearing upon the Petition.

2. The Committee is without knowledge as to the allegations contained in the paragraphs numbered 9 to 13, inclusive, of the Petition.

3. With respect to the allegations contained in the paragraph numbered 14 of the Petition, the Committee prays leave to refer to a true copy of the Manhattan lease when the same is produced upon the hearing upon the Petition.

4. The Committee admits the allegations contained in the paragraphs numbered 15 and 16 of the Petition.

5. The Committee is without knowledge as to the allegations contained in the paragraph numbered 17 of the Petition.

WHEREUPON the Committee, having answered the Interborough Petition, affirmatively alleges as follows:

I. That the Committee by order of this Court was permitted to intervene as a party defendant to the above entitled cause.

II. That the Committee holds a substantial amount of the 7% Notes under the 7% Notes Deposit Agreement and that such 7% Notes are the valid and enforceable obligations of the Interborough.

III. That in and by the bill of complaint of The American Brake Shoe and Foundry Company filed herein on August 26, 1932, it was prayed that the rights of the plaintiff and of all creditors of the Interborough be ascertained and decreed and that the Court administer the properties and assets of the Interborough and for such purpose marshal and administer such assets and ascertain the several and respective liens and priorities existing thereon and enforce by decree the rights, liens and equities of the creditors of the Interborough as the same might be finally ascertained and decreed by the Court.

IV. That subsequent to the entry of the order appointing Receivers herein said Receivers entered upon the property and assets of the Interborough and have since managed and operated the same and have received the tolls, earnings, income and rents thereof.

V. That the earnings of the Manhattan Division, as more fully set forth in the answer of the Interborough Receivers to the Manhattan Petition, include the earnings of the following four lines of railroads owned by Interborough described as:

(1) The Webster Avenue Line;

(2) The Eighth Avenue and 162nd Street Connection;

(3 The Queensborough Bridge Line; and

(4) The West Farms Subway Connection.

VI. That in and by the lease dated January 1, 1903 (a copy of which is annexed as Exhibit (1) to the Petition

verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer), between the Manhattan and the Interborough it was provided in Article Fourteenth that upon the expiration of such lease or upon any sooner termination thereof, all property, extensions, branches, additions, improvements and equipments constructed, made or furnished for or in connection with the Manhattan Division by the Interborough out of its own funds should become the property of the Manhattan upon the payment by the Manhattan of the reasonable value thereof and that in and by the agreement dated March 15, 1913 (a copy of which is annexed as Exhibit (3) to the Petition verified September 28, 1932, of the Interborough Receivers, and by this reference made a part of this answer), between the Manhattan and the Interborough it was provided in Article Sixth thereof that in case of the termination of the lease for any cause and if the Manhattan should be under obligation or should elect under the terms of Article Fourteenth of the agreement of lease dated January 1, 1903, to pay the Interborough the reasonable value of the property, extensions, branches, additions, improvements and equipments constructed, made or furnished by the Interborough out of its own funds, such payment with interest thereon at the rate of 5% from the time of taking possession by the Manhattan should be made by the Manhattan within eighteen months after the date upon which it should give notice of its election to terminate the lease under the provisions of Article Twenty-first of the agreement of lease dated January 1, 1903, and the terms of the agreement of March 15, 1913.

VII. That in the event of the termination of the Manhattan lease, the Manhattan would be obligated in accordance with the lease agreements dated January 1, 1903, and March 15, 1913, respectively, to make payment to the Interborough for the third tracking of the Second, Third

and Ninth Avenue Lines and, also, for the power plants. Pending such payment the rights of the Interborough Receivers and the creditors of the Interborough in and to the earnings of the Manhattan Division allocable to the four lines mentioned in paragraph V hereof, the third tracking, and power plants should be safeguarded and protected by this Court.

VIII. That upon information and belief various claims will be asserted against the Interborough Receivers and the Interborough property on account of supplies and materials furnished to the Interborough and that priority of payment of such claims will be asserted.

IX. That until the claim, if any, of the Manhattan against the Interborough Receivers and its property is established and its character and priority determined, the payments referred to in the Petition cannot properly be made by this Court.

X. That pending a final accounting and a determination of the respective rights and priorities of the creditors of the Interborough, the Committee is advised that it is inadvisable to make payments to particular creditors or classes of creditors.

WHEREFORE, the Committee, having answered the Interborough Petition, prays that in any decree entered by this Court upon the Interborough Petition, the Court will take a just and true account of the matters aforesaid as justice and equity may require and that in any decree which may be entered herein proper provision be made and conditions laid down and required for the safeguarding and protection of the rights of the Committee and the holders of the 7% Notes and that the Committee and the holders of the 7% Notes may have such other and further relief

in the premises as the nature and circumstances of the case might require and as to this Court may seem meet.

Dated, October 1, 1932.

J. P. MORGAN, Chairman,
A. M. ANDERSON,
FREDERIC W. ALLEN,
GEORGE F. BAKER,
EDWARD D. DUFFIELD,
F. H. ECKER,
HALSTEAD G. FREEMAN,
DARWIN P. KINGSLEY,
G. HERMANN KINNICUTT,
H. C. MCELDOWNEY, and
CHARLES E. MITCHELL.

Constituted and acting as a Committee under the Deposit Agreement dated as of July 19, 1932, with respect to Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, and not individually, by

ARTHUR M. ANDERSON.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for the Committee above mentioned,
Office and Post Office Address,
15 Broad Street,
Borough of Manhattan,
City of New York.

EDWIN S. S. SUNDERLAND,
THOMAS O'G. FITZGIBBON,
of Counsel.

Doc. 45

## Notice of Appearance of Counsel on Behalf of Guaranty Trust Company of New York, As Trustee.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

*Sirs:*

PLEASE TAKE NOTICE that we are retained by and appear in this action as attorneys and solicitors for Guaranty Trust Company of New York, as Trustee of the First and Refunding Mortgage dated March 20, 1913, of Interborough Rapid Transit Company, and demand that all documents in this action be served on us at our office, No. 15 Broad Street, Borough of Manhattan, City of New York, New York.

Dated, New York, N. Y., October 1, 1932.

Yours, etc.,

DAVIS, POLK, WARDWELL, GARDINER & REED,
Solicitors for Guaranty Trust Company
of New York, as Trustee, as aforesaid,
Office and Post Office Address:
15 Broad Street,
Borough of Manhattan,
City of New York.

264 *American Brake Shoe Record.*

*Notice of Appearance for Guaranty Trust Co.*

To:

CHADBOURNE, STANCHFIELD & LEVY, Esqrs.,
Attorneys for the Receivers,
25 Broadway, New York City.

JAMES L. QUACKENBUSH, Esq.,
Attorney for Interborough Rapid Transit Company,
165 Broadway, New York City.

BREED, ABBOTT & MORGAN, Esqrs.,
Attorneys for The American Brake Shoe and Foun-
1265 dry Company,
15 Broad Street, New York City.

HUGHES, SCHURMAN & DWIGHT, Esqrs.,
Attorneys for the Receiver of Manhattan Railway Company,
100 Broadway, New York City.

COTTON, FRANKLIN, WRIGHT & GORDON, Esqrs.,
Attorneys for the Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds,
63 Wall Street, New York City.

ROOT, CLARK & BUCKNER, Esqrs.,
1266 Attorneys for the Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company,
31 Nassau Street, New York City.

MARSHALL & WEHLE, Esqrs.,
Attorneys for Harold Palmer and others, as a Committee for 7% Guaranteed Stock of Manhattan Railway Company,
50 Broadway, New York City.

DAVIES, AUERBACH & CORNELL, Esqrs.,
Attorneys for Central Hanover Bank & Trust Company, as Trustee of the Manhattan Mortgage,
1 Wall Street, New York City.

DILLS, MUECKE & SCHELKER, Esqrs.,
Attorneys for Manhattan Railway Company,
1 Pershing Square, New York City.

MILBANK, TWEED, HOPE & WEBB, Esqrs.,
Attorneys for Chase National Bank of the City of New York, as Trustee under Second Mortgage of Manhattan Railway Company,
15 Broad Street, New York City.

Doc. 49a

## Petition of Central Hanover Bank and Trust Company, as Trustee, to Make Receivers Parties Defendant to Bill of Complaint.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

1271

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

*To the Honorable the Judges of the District Court of the United States for the Southern District of New York, in Equity sitting:*

1272 Central Hanover Bank and Trust Company, a corporation organized and existing under the laws of the State of New York, respectfully shows:

FIRST: Petitioner is the Trustee under Consolidated Mortgage of Manhattan Railway Company, dated February 26, 1890, to secure an issue of bonds now outstanding in the aggregate principal amount of over $40,000,000.00 and constituting a lien upon certain of the property now in possession of the Receivers appointed in the above-entitled cause.

SECOND: Default has occurred on the part of Manhattan Railway Company in respect of certain of the provisions of said Consolidated Mortgage and petitioner intends to file in this Court its bill of complaint to enforce the rights of itself and of the holders of bonds and coupons secured by said Consolidated Mortgage. The Receivers appointed by this Court in the above-entitled cause of the property, respectively, of Interborough Rapid Transit Company and Manhattan Railway Company, have an interest in the subject-matter of your petitioner's proposed bill of complaint and have a right to be heard in respect thereof and are or may be necessary parties to said bill of complaint.

WHEREFORE, petitioner prays that leave be granted to it to make the said Receivers parties defendant to its said proposed bill of complaint.

CENTRAL HANOVER BANK AND TRUST COMPANY,
as Trustee,
By F. J. FULLER,
Vice-President,
Petitioner.

(Seal)

Attest:

J. T. HARRIGAN,
Assistant Secretary.

DAVIES, AUERBACH & CORNELL,
Solicitors for Petitioner.

EDWARD CORNELL,
H. C. MCCOLLOM,
of Counsel.

Doc. 50

## Answer of Receiver of Manhattan Railway Company to the Petition of the Receivers of the Interborough Rapid Transit Company, Verified September 28, 1932.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

1277 THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. — In Equity E 70-364

*To the Honorable the Judges of the District Court of the United States for the Southern District of New York, In Equity Sitting:*

WILLIAM ROBERTS, Receiver of Manhattan Railway Company, does hereby make answer to the petition (hereinafter
1278 sometimes called the "petition") of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of the Interborough Rapid Transit Company (hereinafter sometimes called the "Receivers"), verified and filed herein on September 28, 1932, as follows:

I. He admits the execution of the lease and contracts referred to in paragraphs 1 to 8, inclusive, and 11, 14, 15 and 16 of the petition, and that the allegations with respect to said transactions made in said paragraphs are in most respects true and correct, but for a full statement

of the contents and effect of said instruments begs leave to refer to the same or true copies thereof.

II. Answering paragraph 9 of the petition, he does not now question the figures alleged therein, but asks that they be deemed to be subject to subsequent verification.

III. Answering paragraph 10 of the petition, he denies, on information and belief, that the earning power of the Manhattan Division was reduced solely because of the longer passenger haul involved in the operation of these lines and the increase in operating costs which followed the World War, and alleges that the chief cause of such reduction was the making by Interborough Rapid Transit Company of an agreement with the City of New York on March 19, 1913, which, as construed by the courts, obligated the Interborough Company to operate the lines leased from the Manhattan Railway Company, as well as the subway lines, at a five-cent fare. Further answering said paragraph, he denies, on information and belief, that upon proper principles of accounting the losses on the operation of the Manhattan Division for the first five years after operation commenced on July 1, 1917, would have been in the amounts therein set forth.

IV. Answering paragraph 12 of the petition, he is without knowledge as to the allegation therein contained that, following the adoption of the 1922 Plan, the Elevated actually carried 180,500,000 less passengers than was estimated in 1921; he does not now question the other figures contained in said paragraph as to the number of passengers carried during the fiscal years ended June 30, 1922, to 1932, inclusive, but denies the conclusion therein stated that the volume of traffic has progressively and consistently declined, it appearing that such volume has been remarkably consistent until the years 1931 and 1932,

1282 when, as he is informed and believes, it was affected by the general business depression.

V. Answering paragraphs 12-a, 12-b and 12-c of the petition, he denies, on information and belief, that deficits in the amounts therein stated would have occurred if proper accounting methods had been employed in determining the income of the Manhattan Division; he further alleges that the figures set forth in said paragraph 12-a for the years ended June 30, 1923, to 1928, inclusive, do not afford an accurate comparison with the later years, in that there are included, as he is informed and believes, 1283 in the losses for the years ended June 30, 1923, to 1928, inclusive, amounts either paid or set up upon account of dividend rentals on modified stock of the Manhattan Railway Company aggregating approximately $15,000,000.

VI. He admits the allegations contained in paragraph 13 of the petition.

VII. He denies on information and belief that the Receivers of the Interborough Rapid Transit Company have not had sufficient time to make as complete an investigation as may be necessary to enable them to make representations to the Court with respect to the proper action to be taken by them in connection with the payment of 1284 the sums referred to in said paragraph 13 of the petition.

WHEREUPON William Roberts as such Receiver, having answered the said petition, affirmatively further alleges as follows:

VIII. He avers that the allegations and all of them contained in the said petition of the Receivers of the Interborough Rapid Transit Company are insufficient to justify and delay in the payment by said Receivers of the amounts referred to in paragraph 13 of the petition.

IX. On September 28, 1932, he made application herein upon his petition verified that day for an order directing the Receivers of the Interborough Rapid Transit Company to pay the interest due October 1, 1932, upon the Consolidated Mortgage Bonds of Manhattan Railway Company and taxes due and payable in respect to properties of the Manhattan Railway Company, without prejudice to any subsequent application or any further relief in the premises, and he refers to the allegations in said petition setting forth the facts and reasons which he deems to require such an order, with the same effect as if the same were herein set forth at length.

X. Under date of March 19, 1913, Interborough Rapid Transit Company entered into three agreements with the City of New York, one of which, known as Contract No. 3, provided for the construction of additional subways and the operation thereof by Interborough Rapid Transit Company, another related to the construction by Interborough Rapid Transit Company of extensions to the lines of railroad owned by Manhattan Railway Company, and the third related to trackage rights granted by the City of New York to Interborough Rapid Transit Company over lines of railroad constructed pursuant to Contract No. 3; said contracts are public documents and are hereby incorporated by reference and made a part hereof. Said contracts were entered into by the Interborough Rapid Transit Company to provide a dual system of rapid transit throughout the City of New York by subways and elevated railroads.

XI. Contract No. 3, relating to the subways, has proven to be profitable to Interborough Rapid Transit Company solely by reason of the fact that under said contract Interborough Rapid Transit Company is given a large preferential payment out of the earnings of the subways before any payments are made to the City of New York in return

for its large investment in the subways. Moreover, the operating expenses of the subways are not burdened with heavy taxes. For the year ended June 30, 1932, the taxes charged against the operating revenue of the Subway Division were $445,706 as against $1,931,736 charged against the Elevated Division.

XII. The elevated lines contribute their fair proportion to the gross revenues obtained by the Interborough Rapid Transit Company and its Receivers from the operation of the dual system of rapid transit. No decision has
1289 been reached by the Receivers as to whether they will recommend the separation of the elevated lines from the subway division. At least until a plan to that end shall have been formulated by the Receivers of the Interborough Rapid Transit Company, they should use the gross revenues obtained from the operation of both systems in a manner which is fair and equitable to the holders of securities of both Manhattan Railway Company and Interborough Rapid Transit Company.

XIII. The mortgage of Manhattan Railway Company carries only four per cent. interest charges, has no sinking fund requirements and does not mature until 1990. The Receivers of the Interborough Rapid Transit Company owe a duty to Manhattan Railway Company to protect it
1290 from the irreparable loss which is threatened by the continuance of the default under that mortgage.

XIV. This Receiver of Manhattan Railway Company does not, by anything in this answer or in his petition of September 28, 1932, waive or acquiesce in the failure on the part of the Interborough Rapid Transit Company or its Receivers to comply in full with all of the provisions of the lease of the properties of the Manhattan Company to the Interborough Company. He asks for the payment of the bond interest and taxes aforesaid as a measure im-

mediately required, but only upon condition that it is without prejudice to the right of the Manhattan Company and his right as Receiver to full performance of all the terms and conditions of said lease.

WHEREFORE, William Roberts, as such Receiver, respectfully asks that this Court instruct the Receivers of the Interborough Rapid Transit Company in accordance with the prayers in his own petition, above referred to, verified September 28, 1932, and in this answer.

WILLIAM ROBERTS,
Receiver of Manhattan Railway Company.

HUGHES, SCHURMAN & DWIGHT,
Solicitors for William Roberts, Receiver,
100 Broadway, New York City.

Doc. 51

**Answer of The American Brake Shoe and Foundry Company, Plaintiff in this Cause, to the Petition of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers for Defendant, Filed September 28, 1932.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

1295

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

The American Brake Shoe and Foundry Company, plaintiff in this cause, for answer to the petition of Victor J. Dowling and Thomas E. Murray, Jr., as Receivers for defendant, filed herein on September 28, 1932, praying, among other things, for instructions from the Court with
1296 respect to the payment of certain rentals under lease from Manhattan Railway Company, or unto so much and such parts thereof as plaintiff is advised it is necessary or material for it to make answer, answering says:

FIRST: Plaintiff admits the allegations contained in paragraphs 1 to 8, inclusive, of the petition.

SECOND: Plaintiff admits the allegations contained in paragraph 9 of the petition, except that it is without

knowledge with respect to the particular securities representing the capital expenditures and capital moneys referred to in said paragraph and with respect to the amount of debt service referred to therein.

THIRD: Plaintiff is without knowledge with respect to any of the allegations contained in paragraph 10 of the petition.

FOURTH: Plaintiff admits the allegations contained in paragraph 11 of the petition.

FIFTH. Plaintiff is without knowledge with respect to any of the allegations contained in paragraphs 12 to 12c, inclusive, of the petition.

SIXTH: Plaintiff admits the allegations contained in paragraph 13, except that plaintiff is without knowledge with respect to any demand from Manhattan Railway Company that defendant pay certain taxes or deposit the amount thereof in a bank or trust company; that Manhattan Railway Company and its Receiver gave any notice and demand to defendant's Receivers with respect to a quarterly installment of Federal income taxes of Manhattan Railway Company nor as to the amount of such installment.

SEVENTH: Plaintiff admits the allegations contained in paragraphs 14, 15, 16 and 17 of the petition.

EIGHTH: Further answering the petition, plaintiff avers upon information and belief that the Receivers of defendant have made no election with respect to the adoption or the rejection of the lease by defendant of the properties of Manhattan Railway Company referred to in the petition, and that the payment by the Receivers of rent under said lease, in so far as such rent would cover the use of properties of Manhattan Railway Company by

defendant prior to the appointment of the Receivers of defendant, would, in the event of the rejection of said lease, constitute a preferential payment to or for the account of one general creditor of defendant and would be prejudicial to the rights of all of the other creditors of defendant.

WHEREFORE, plaintiff prays that the Receivers of defendant be instructed to make no payments by way of rental under the lease of Manhattan Railway Company unless and until said lease shall have been adopted.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
By E. B. SIBBALD,
Assistant Secretary.

BREED, ABBOTT & MORGAN,
Solicitors for Plaintiff,
15 Broad Street,
New York, N. Y.

Doc. 52

**Answer of The American Brake Shoe and Foundry Company, Plaintiff in this Cause, to the Petition of William Roberts, Receiver of Manhattan Railway Company, Filed September 28, 1932.**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

The American Brake Shoe and Foundry Company, plaintiff in this cause, for answer to the petition of William Roberts, Receiver of Manhattan Railway Company, filed herein on September 28, 1932, asking for an order directing the Receivers of Interborough Rapid Transit Company to pay on October 1, 1932, the interest due upon the first mortgage bonds of Manhattan Railway Company and to pay taxes which are due and payable with respect to properties of Manhattan Railway Company, or unto so much and such parts thereof as plaintiff is advised it is necessary or material for it to make answer, answering, says:

FIRST: Plaintiff admits the allegations contained in Paragraphs I to V, inclusive, of the petition.

306 *American Brake Shoe Record.*
*Answer of Complainant to Petition.*

SECOND: Answering Paragraph VI, plaintiff avers upon information and belief that Manhattan Railway Company has a period of sixty days' grace after October 1, 1932, within which to make payment of the interest on the consolidated mortgage 4% bonds of Manhattan Railway Company referred to in said petition; and that interest on the second mortgage 4% bonds of Manhattan Railway Company referred to in said petition does not become due until the 1st day of December, 1932; and avers that it is without knowledge as to whether a failure to make the interest and tax payments referred to in said Paragraph VI would
1307 lead to any of the consequences therein averred.

THIRD: Answering Paragraph VII, plaintiff admits the allegations therein contained except that it avers that it is without knowledge as to whether the petitioner has any way of providing funds necessary to remedy the default and meet the bond interest therein referred to except by the application to this Court set forth in said petition.

FOURTH: Answering Paragraphs VIII, IX and X, plaintiff is without knowledge with respect to the allegations therein contained.

FIFTH: Answering Paragraph XI, plaintiff admits that the cost to Interborough Rapid Transit Company of the
1308 elevated extensions, third tracks and power plant improvements has not been in excess of $45,000,000, and that the investment by Interborough Rapid Transit Company in the third tracks and power house improvements upon Manhattan Railway Company property is not less than $27,000,000, but avers that it is without knowledge with respect to the other allegations contained in said paragraph.

SIXTH: Answering Paragraph XII, plaintiff is without knowledge with respect to the allegations therein contained.

SEVENTH: Answering Paragraph XIII, plaintiff is without knowledge with respect to the allegations contained in said paragraph, except that it admits that by the agreement made by Interborough Rapid Transit Company with the City of New York in 1913, as construed by the courts, Interborough Rapid Transit Company agreed to operate the elevated railroads constructed pursuant to the elevated certificates, together with the lines leased from Manhattan Railway Company, for a five-cent fare.

EIGHTH: Answering Paragraphs XIV and XV, plaintiff admits the allegations therein contained.

NINTH: Answering Paragraph XVI, plaintiff is without knowledge with respect to the allegations therein contained.

TENTH: Answering Paragraph XVII, plaintiff denies each and every allegation therein contained.

ELEVENTH: Further answering the petition, plaintiff avers upon information and belief that the Receivers of Interborough Rapid Transit Company have made no election with respect to the adoption or the rejection of the lease by defendant of the properties of Manhattan Railway Company referred to in the petition, and that the payment by the Receivers of rent under said lease in accordance with the prayer of said petition, in so far as such rent would cover the use of the properties of Manhattan Railway Company by defendant prior to the appointment of the Receivers of defendant, would, in the event of the rejection of such lease, constitute a preferential payment to or for the account of one general creditor of defendant and would be prejudicial to the rights of all of the other creditors of defendant.

1312 *American Brake Shoe Record.*
*Answer of Complainant to Petition.*

WHEREFORE, plaintiff prays that said petition be dismissed.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
By E. B. SIBBALD,
Assistant Secretary.

BREED, ABBOTT & MORGAN,
Solicitors for Plaintiff,
15 Broad Street,
New York, N. Y.

1313

1314

Doc. 53

**Notice of Motion on Petition of Central Hanover Bank and Trust Company, as Trustee, for Payment of Taxes and Interest, Segregation of Income and Other Relief.**

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| AMERICAN BRAKE SHOE & FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

*Sirs:*

PLEASE TAKE NOTICE that upon the petition verified October 3, 1932, and hereto attached of Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Company, we shall move this Court on Monday, October 3, 1932, at 3 o'clock P. M., or as soon thereafter as counsel can be heard, at Room 439, in the Old United States Post Office Building, Broadway and Park Place, Borough of Manhattan, City of

New York, for an order granting the relief prayed for in said petition.

Dated, New York, October 3, 1932.

Yours, etc.,

DAVIES, AUERBACH & CORNELL,
Solicitors for Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Company,
Office and Post Office Address,
No. 1 Wall Street,
Borough of Manhattan,
New York City.

To:

Messrs. Breed, Abbott & Morgan,
Solicitors for Complainant,
15 Broad Street, New York City.

James L. Quackenbush, Esq.,
Solicitor for Defendant,
65 Broadway, New York City.

Messrs. Chadbourne, Stanchfield & Levy,
Solicitors for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company,
25 Broadway, New York City.

Messrs. Davis, Polk, Wardwell, Gardiner & Reed,
Solicitors for Committee of Interborough Rapid Transit Company 10-Year Secured Convertible 7% Gold Notes due September 1, 1932, and for Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds due January 1, 1966, and for Guaranty Trust Company of New York as Trustee under said Mortgage,
15 Broad Street, New York City.

*American Brake Shoe Record.*
*Notice of Motion of Trustee for Payments.*

Messrs. Root, Clark & Buckner,
Solicitors for Committee for Interborough Rapid Transit Company 10-Year 6% Gold Notes due October 1, 1922,
31 Nassau Street, New York City.

Messrs. Dills, Muecke & Schelker,
Solicitors for Manhattan Railway Company,
1 Pershing Square, New York City.

Messrs. Hughes, Schurman & Dwight,
Solicitors for William Roberts, Receiver of Manhattan Railway Company,
100 Broadway, New York City.

Messrs. Cotton, Franklin, Wright & Gordon,
Solicitors for Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Gold Bonds,
63 Wall Street, New York City.

Messrs. Milbank, Tweed, Hope & Webb,
Solicitors for Chase National Bank of the City of New York as Trustee under Second Mortgage of Manhattan Railway Company,
15 Broad Street, New York City.

Messrs. Marshall & Wehle,
Solicitors for Protective Committee for 7% Guaranteed Stock of Manhattan Railway Company,
50 Broadway, New York City.

Doc. 53

**Petition of Central Hanover Bank and Trust Company, as Trustee, for Payment of Taxes and Interest, Segregation of Income and Other Relief.**

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

1325

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

In Equity
E 70-364.

*To the Honorable the Judges of the District Court of the United States for the Southern District of New York, in Equity Sitting:*

1326 The petition of Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company, hereinafter mentioned, respectfully shows:

1. This petitioner, on September 19, 1932, filed in this Court a certain petition praying for an order permitting it to intervene herein and making it a party hereto; and upon said petition an order was made by this Court and filed herein on said date, granting the relief prayed for in said petition. By said petition it appears that under a

mortgage made by Manhattan Railway Company (hereinafter termed Manhattan), dated February 26, 1890, as supplemented by a certain indenture supplemental thereto, dated June 13, 1899 (said mortgage as so supplemented being herein termed the Consolidated Mortgage), under which this petitioner is the Trustee, there are secured certain bonds aggregating in principal amount $40,683,000, dated April 1, 1890, and payable April 1, 1990, with interest at the rate of four per cent. (4%) per annum, payable semi-annually on October 1st and April 1st in each year. To said petition and order petitioner prays reference and makes the same a part hereof. Petitioner also prays reference to, and makes a part hereof, the bill of complaint in the above entitled cause, dated and filed herein on August 26, 1932, the answer thereto of Interborough Rapid Transit Company (hereinafter termed Interborough), filed on the same date, the order appointing Victor J. Dowling and Thomas E. Murray, Jr. (hereinafter termed the Interborough Receivers), as Receivers of the property of Interborough dated and filed herein on the same date, the petition of Manhattan dated and filed herein on September 2, 1932, asking that it be made a party defendant and for other relief, and the order dated and filed herein on September 6, 1932, appointing William Roberts (hereinafter termed the Manhattan Receivers), as Receiver of the property of Manhattan.

2. On September 28, 1932, this petitioner filed in this Court its bill of complaint for the impounding of the tolls, income, rents, issues and profits of the property covered by said Consolidated Mortgage and for other relief, a copy of which bill of complaint (without exhibits thereto) is annexed hereto as Exhibit A and made a part hereof. The exhibits annexed to said bill of complaint are the above-mentioned mortgage of February 26, 1890, and the indenture supplemental thereto, originals or true copies of which will be produced upon the hearing hereof.

330 *American Brake Shoe Record.*
*Petition of Trustee for Payment of Taxes, Etc.*

3. Under the Lease from Manhattan to Interborough, dated January 1, 1903, and referred to in petitioner's said bill of complaint, under which substantially all of the property of Manhattan was held by Interborough until the Interborough Receivers took possession thereof, Interborough agreed to make various payments, as provided in said Lease, including among other things the payment of taxes upon the demised premises and the payment of the interest on the bonds secured by said Consolidated Mortgage.

By the bill of complaint in the above-entitled cause it is alleged, and by the answer of the defendant Inter-
331 borough therein it is admitted, that certain taxes amounting with interest to over $860,000 have been duly assessed by the City of New York against special franchises and real estate belonging to Manhattan, and that said taxes have not been paid although due and payable in May, 1932, and Manhattan on June 22, 1932, notified Interborough that said special franchise taxes and real estate taxes amounting to upwards of $780,000 were due and payable on May 31, 1932, and has demanded that they be paid. The failure to pay said taxes constitutes a default under the Consolidated Mortgage by virtue of which the Trustee thereunder is empowered to foreclose said Consolidated Mortgage or to take other remedies for the enforcement thereof, and the principal of all of the bonds
332 outstanding under and secured by said Consolidated Mortgage may at any time be declared due and payable. The failure of Interborough to pay the said taxes constitutes a default under the said Lease, by virtue of which, at the expiration of ninety days after the demand heretofore made by Manhattan upon Interborough dated June 22, 1932, the said Lease may be terminated.

4. Petitioner is advised and believes and therefore alleges that by the filing of its aforesaid bill of complaint on September 28, 1932, the tolls, income, rents, issues and

profits of the mortgaged property were impounded as of the date of the filing thereof. As appears from said bill of complaint, there is held by the Interborough Receivers, under the said Lease from Manhattan to Interborough, substantially all the property of Manhattan, all of which property, as plaintiff is advised and believes, is subject to the prior lien of the Consolidated Mortgage. If this Court has the power to order the rejection of said Lease, the said Lease may hereafter be adopted or rejected; but while default exists under the Consolidated Mortgage in the payment of the taxes due in May, 1932, or otherwise exists, petitioner is entitled to have impounded, and it has impounded as of September 28, 1932, the tolls, income, rents, issues and profits of the mortgaged premises. The said impounding does not affect in any way the said Lease. If all payments under the Lease shall be made and all defaults under the said Consolidated Mortgage shall be duly cured, the lien of the Consolidated Mortgage upon the said tolls, income, rents, issues and profits will be released. If the Lease shall be rejected the minimum amount which, as alleged in said bill of complaint, will be payable by the Interborough Receivers for the period of their possession of the leased property, will be the net earnings, properly to be computed, thereof. Petitioner is advised and believes, and therefore alleges, that during continuance of default under the Consolidated Mortgage and pending the adoption or rejection of the lease, petitioner is entitled to have impounded, and has impounded, the tolls, income, rents, issues and profits of the mortgaged premises, subject only to such expenses as may lawfully and properly be incurred in the operation and preservation of said property, having due regard for the rights of petitioner and of the holders of the bonds and coupons secured by the Consolidated Mortgage and for the protection of the security for said Consolidated Mortgage. Petitioner is advised and believes and therefore alleges that for the proper protec-

tion of its rights and the rights of the holders of the bonds and coupons secured by said Consolidated Mortgage, it is entitled to be safeguarded against the use of the net earnings (which term as used herein is the equivalent of the term "Gross Income" as used in the Uniform System of Accounts hereinafter mentioned) from the mortgaged property in any way other than by the holding of the same (1) so long as default exists under the Consolidated Mortgage, subject to the lien of the Consolidated Mortgage, or (2) while such default does not exist but default exists under the Lease, for the account of the Manhattan
337 Receiver; that it would be most inequitable and improper that the said net earnings should be held as a part of the general funds of the Interborough Receivers and subject to their use; and that the only way by which the rights of petitioner and of the holders of the bonds and coupons secured by the Consolidated Mortgage can be adequately and properly protected is by the segregation, in a separate account, of said net earnings of the Manhattan property, subject, while default exists under the Consolidated Mortgage, to the prior lien of said mortgage and subject to the payment over, at such times as the Court may direct, of the balance in said account to the receiver when appointed under petitioner's said bill of complaint, and until that time to the Manhattan Receiver, and/or any other receiver appointed of the property of Manhattan, subject to the
338 prior lien of the said Consolidated Mortgage and subject, also, to the non-use of any said moneys so paid over until further order of the Court. Nothing in petitioner's said bill of complaint or herein contained is intended to affect, or does affect, the said Lease; but petitioner reserves the right, at any time, to apply to this Court for directions in respect of said Lease and/or the leased property or any part thereof or to take any other action in respect thereof or for the enforcement of its rights and the rights of the holders of the bonds and coupons secured by said Consoli-

dated Mortgage; and petitioner does not in any way waive its assertion that in the event of rejection or termination of said Lease the amounts payable by the Interborough Receivers, for the period of their possession of the Manhattan property, will largely exceed the net earnings of the Manhattan property.

5. By the above mentioned order, made by this Court herein on September 6, 1932, appointing the Manhattan Receiver, it was provided as follows:

> "And the said temporary Receivers of Interborough Rapid Transit Company are hereby directed to keep separate accounts with respect to the properties of Manhattan Railway Company so that the rents, issues and profits from such properties may be segregated."

Some time may elapse before it will be practicable to determine the rents, issues and profits from the Manhattan property, inasmuch as said property is now operated, and its income is accounted for and reported, in conjunction with other properties, constituting with the Manhattan property the so-called "Interborough Rapid Transit Company-Elevated Division" mentioned in the reports of Interborough to the Transit Commission, and in various respects the accounts of Interborough are so kept that they fall far short of reflecting the true net earnings of Manhattan. Pending the time when it shall be practicable to properly determine said net earnings or even to set up a basis upon which Manhattan net earnings can be provisionally segregated, your petitioner prays that the segregation be upon the basis stated in the prayers for relief hereinafter contained, but without prejudice to petitioner's assertion that the net earnings of Manhattan should be promptly segregated upon a proper basis.

1342 *American Brake Shoe Record.*
*Petition of Trustee for Payment of Taxes, Etc.*

6. On October 1, 1932, there became due and payable under said Lease the sum of $813,660, being the semi-annual installment of interest due on that date at the rate of 4% per annum on the $40,683,000 in principal amount of bonds secured by said Consolidated Mortgage. Failure to make the said payment on October 1, 1932, will result simultaneously in another default under the Consolidated Mortgage, giving to petitioner and to the holders of bonds and coupons secured by said mortgage the rights and remedies therein provided for or otherwise afforded by the law. Petitioner prays that the Interborough Receivers be directed forthwith to pay the taxes (with interest) im-
1343 posed against property of Manhattan and payable in May, 1932, and be directed to pay forthwith said installment of interest due October 1, 1932. Petitioner joins in the request made by the Manhattan Receiver, by petition herein dated September 28, 1932, that said taxes and interest be paid forthwith. Petitioner is advised and believes and therefore alleges that Interborough for many years had the benefit of and used large amounts of net profits accruing from the operation of the leased Manhattan property; that the Interborough Receivers are in possession of ample funds from which to pay said taxes and interest; and that said funds are free from any lien which would prevent the equitable disposition by this Court thereof to the extent herein prayed for. As petitioner is advised and believes
1344 and therefore alleges, it would be entirely premature to allow said taxes to continue in default and default to be created and continue in the payment of said mortgage interest in advance of a clear showing, which has not been made, that such default should be allowed, with the consequent immediate danger of disruption of the system, breach of contract of Interborough with the City of New York, loss by Interborough of any claim to the amounts expended by it upon Manhattan properties and the necessary elimination by foreclosure of the interests in the Manhattan property junior to the Consolidated Mortgage.

Furthermore, under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913, it is provided in Article Five, Section 2, that in case of the happening of one or more of the events therein called "events of default," the Trustee may exercise the remedies therein provided for, by way of entry, precipitation of principal, sale at public auction, foreclosure or other appropriate remedy—one of such "events of default" being defined in subdivision (g) of said Section 2 of Article Five as follows:

> "(g) Default in the payment of the rent reserved, or in any other payment required to be made, in the lease to the Interborough Company from Manhattan Railway Company, dated January 1, 1903, or in any agreement amendatory thereof or supplemental thereto, or in the performance of any other condition in said lease contained (the breach of which condition by the terms of said lease shall expose the Interborough Company to forfeiture or reentry), or in the payment of the interest upon any bonds of the Manhattan Railway Company hereafter issued with the consent of the Interborough Company,—any of which defaults shall have continued for the period of sixty days after written notice thereof from said Manhattan Railway Company or from the Trustee hereunder; provided that in good faith the existence of such default shall not be contested by the Interborough Company."

Your petitioner is advised and believes and therefore alleges that default in the payment of rent reserved under said lease, to wit, the taxes which became due and payable in May, 1932, has continued for the period of sixty days after written notice thereof from Manhattan given to Interborough on June 22, 1932. The foreclosure of said First and Refunding Mortgage would eliminate the in-

terests in the Interborough property junior to said mortgage.

Whether after the said taxes of May, 1932, and interest due October 1, 1932, have been paid the Interborough Receivers shall be directed to adopt the Lease or to make future payments under said Lease is, as petitioner is advised and believes, a question which may properly be determined upon a full presentation of all of the pertinent and most complicated facts; but this petitioner submits that to allow the said defaults to exist and continue permits the disruption of the system in advance of any showing whatever that this Court should permit such results.

1349

7. Petitioner is advised and believes and therefore alleges that certain of the interest which became due and payable on April 1, 1932, and prior thereto, on the bonds secured by said Consolidated Mortgage has not been paid by reason of the fact that when the Interborough Receivers were appointed and took possession of the Interborough property, as well as the property leased to Interborough by Manhattan, some of said interest had not been demanded; that the Interborough Receivers have in their hands funds very largely in excess of the amounts required to pay said interest; and that the Interborough Receivers should be directed as a matter of equity to make payment of said interest as and when the coupons representing the same shall be presented or payment of said interest shall be otherwise properly demanded.

1350

WHEREFORE, this petitioner prays (without effect upon the Lease from Manhattan Railway Company to Interborough Rapid Transit Company, dated January 1, 1903, and without prejudice to the right of petitioner to seek other, further or different relief, and without prejudice to any claim of petitioner to tolls, income, rents, issues and profits, of the property covered by the Consolidated Mort-

gage, for the period prior to the filing of its said bill of complaint on September 28, 1932):

(1) that the Interborough Receivers be directed forthwith to pay the taxes (with interest) imposed against any property of Manhattan Railway Company and heretofore due and payable and now unpaid, as well as the interest due October 1, 1932, upon the bonds secured by the Consolidated Mortgage of Manhattan Railway Company;

(2) that unless and until all defaults under the Consolidated Mortgage of Manhattan Railway Company be duly cured and while default exists under the Consolidated Mortgage, the present and any other receivers of the property of Interborough Rapid Transit Company be directed as soon as practicable to segregate and to hold in a separate account the Revenues, accruing on and after September 28, 1932, in or coming into their possession or control from the properties in their possession owned by Manhattan Railway Company—as Revenues are defined in the Uniform System of Accounts of Street and Electric Railways as prescribed by the Public Service Commission for the First District of the State of New York—now known as the Transit Commission (Department of Public Service, Metropolitan Division) of the State of New York—and from such account to pay, until further order of the Court, only such expenses as are defined in said Uniform System of Accounts as Operating Expenses and Taxes Assignable to Operation; and that until it shall be practicable so to segregate such Revenues of the Manhattan owned property, that the said receivers be directed to segregate and hold in a separate account such Revenues from the properties included in the reports of the Interborough Rapid Transit Company to the Transit Com-

mission under the heading "Interborough Rapid Transit Company—Elevated Division" (without prejudice to petitioner's prayer that the net earnings—or Gross Income as defined in said Uniform System of Accounts—of Manhattan Railway Company be promptly segregated upon the proper basis), and until further order of the Court to pay from such Revenues only such Operating Expenses and Taxes Assignable to Operation, and that at such time or times as this Court shall determine, the balance in said account be paid over to the receiver
1355 when appointed and qualified under the bill of complaint of this petitioner filed in this Court on September 28, 1932, but until such receiver shall be appointed and shall duly qualify, to William Roberts, as Receiver of the property of Manhattan Railway Company and/or such other or additional receivers of the property of Manhattan Railway Company as shall be duly acting as such, to be held by him or them in a separate account; and that this petitioner as Trustee as aforesaid shall have a first and prior lien upon all funds at any time in said account of any receiver of the property of Manhattan Railway Company, or in said account of any receiver of the property of Interborough Rapid Transit Company, subject to the payment there-
1356 from of such Operating Expenses and Taxes Assignable to Operation as aforesaid and subject to the non-use of any amounts so paid over to any receiver of any property of Manhattan Railway Company until the further order of this Court; and that in the event that all defaults under the Consolidated Mortgage of Manhattan Railway Company shall be duly cured, and while default shall not exist under the Consolidated Mortgage, then, unless and until the aforesaid Lease shall be adopted and all provisions thereof shall have been complied with by any

receivers of the property of Interborough Rapid Transit Company, the said Revenues be segregated and held in a separate account and held and applied as aforesaid, except that the question of the lien of the Consolidated Mortgage upon the moneys in any such account, while there shall be no default under the Consolidated Mortgage, be reserved for further order;

(3) that the Interborough Receivers be directed to pay all unpaid interest due April 1, 1932, and prior thereto, upon the bonds secured by the Consolidated Mortgage of Manhattan Railway Company upon presentation of the unpaid coupons evidencing such interest or upon other proper demand for said interest; and

(4) that the petitioner have such other and further relief as may be just and proper.

CENTRAL HANOVER BANK AND TRUST COMPANY,
as Trustee,
By S. A. BROWN,
Vice-President.

Attest:

J. T. HARRIGAN,
Assistant Secretary.

(Corporate Seal)

....,
Petitioner.

DAVIES, AUERBACH & CORNELL,
Solicitors for Petitioner.

H. C. MCCOLLOM,
Of Counsel.

1360 *American Brake Shoe Record.*

## Exhibit A.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

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| CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, Plaintiff, against MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers of the property of Interborough Rapid Transit Company, WILLIAM ROBERTS, as Receiver of the property of Manhattan Railway Company, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee under Second Mortgage of Manhattan Railway Company, and THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Defendants. | In Equity. |

1361

1362 BILL OF COMPLAINT.

*To the Honorable the Judges of the District Court of the United States for the Southern District of New York, in Equity Sitting:*

Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage hereinafter mentioned, for its bill of complaint herein, alleges:

1. The plaintiff, Central Hanover Bank and Trust Company, under said name and under its prior names, was at

all the times hereinafter mentioned, and it still is, a corporation duly organized and existing under the laws of the State of New York, a citizen and resident of said State and a resident and inhabitant of the Southern District of New York; and at all of said times it was, and it still is, duly authorized and empowered under the terms of its charter to take and hold in trust the property granted, bargained, sold, conveyed and confirmed to it upon the trusts hereinafter stated, and to execute and perform the trusts upon it imposed under and by virtue of the terms and provisions of the Consolidated Mortgage hereinafter mentioned.

2. The defendant Manhattan Railway Company (hereinafter sometimes termed Manhattan), at all the times hereinafter mentioned was, and it still is, a corporation duly organized and existing under the laws of the State of New York, a citizen and resident of said State and a resident and inhabitant of the Southern District of New York.

3. Plaintiff is informed and believes and therefore alleges that the defendant Interborough Rapid Transit Company (hereinafter sometimes termed Interborough) is a corporation duly organized and existing under the laws of the State of New York, a citizen and resident of said State and a resident and inhabitant of the Southern District of New York.

4. Plaintiff is informed and believes and therefore alleges that the defendant Victor J. Dowling is a citizen and resident of the State of New York and a resident and inhabitant of the Southern District of New York.

5. Plaintiff is informed and believes and therefore alleges that the defendant Thomas E. Murray, Jr., is a citizen and resident of the State of New York and a resident and inhabitant of the Eastern District of New York.

1366 *American Brake Shoe Record.*
*Exhibit A to Petition—Bill of Complaint.*

6. Plaintiff is informed and believes and therefore alleges that the defendant William Roberts is a citizen and resident of the State of New York and a resident and inhabitant of the Southern District of New York.

7. Plaintiff is informed and believes and therefore alleges that the defendant The Chase National Bank of the City of New York is a corporation duly organized and existing under the laws of the State of New York, a citizen and resident of said State, and a resident and inhabitant of the Southern District of New York.

8. Plaintiff is informed and believes and therefore
1367 alleges that the defendant The American Brake Shoe and Foundry Company is a corporation duly organized and existing under the laws of the State of Delaware, a citizen and resident of said State, and a resident and inhabitant of said State, also resident in the Southern District of New York.

9. The ground upon which the jurisdiction of this Court depends is that in the bill of complaint filed in this Court on August 26, 1932, in the cause hereinafter referred to, brought by The American Brake Shoe and Foundry Company, Plaintiff, against Interborough Rapid Transit Company, Defendant, In Equity No. 70-364, the appointment was prayed for of a receiver of the property of Interborough, as well as the property of Manhattan
1368 which was leased to Interborough by lease dated January 1, 1903, and to which the present bill of complaint relates, and the defendant Interborough filed in said Court in said cause its answer admitting the allegations of the bill of complaint therein, and in said cause Manhattan, on September 2, 1932, filed its petition praying that it might become a party defendant to said cause and that the receivership therein be extended to the property of Manhattan; and also, this Court, on August 26, 1932, made an order appointing the defendants Victor J. Dowling

and Thomas E. Murray, Jr. (hereinafter termed the Interborough Receivers), as Receivers of the property of Interborough, including the property of Manhattan which was so leased to Interborough and to which the present bill of complaint relates, and thereafter said Interborough Receivers qualified and took possession of all of the aforesaid property and have since been and now are in possession of the same, and on September 6, 1932, this Court made an order appointing the defendant William Roberts (hereinafter termed the Manhattan Receiver) as Receiver of the property of Manhattan, and thereafter the said William Roberts qualified as Receiver of the property of Manhattan and has ever since been and now is in possession of its property and rights in so far as the same have not been and are not now in the possession of the Interborough Receivers. The amount in controversy in this suit exceeds $5,000.

10. Heretofore and on or about February 26, 1890, and prior to the execution and delivery of the mortgage hereinafter mentioned, Manhattan, being thereunto duly authorized by the laws of the State of New York and by and pursuant to resolutions duly adopted by its stockholders and its Board of Directors and for its due and proper corporate business, duly authorized the issuance and delivery of Consolidated Mortgage Gold Bonds of Manhattan (hereinafter termed the bonds) to an amount limited as in said mortgage provided, such bonds to be dated April 1, 1890, and to be payable April 1, 1990, with interest thereon from April 1, 1890, at the rate of 4% per annum, payable semi-annually on the 1st days of October and April in each year.

11. In pursuance of the aforesaid purposes, Manhattan and The Metropolitan Elevated Railway Company, a New York corporation (hereinafter termed Metropolitan), being thereunto duly authorized by the laws of the State

1372 of New York and by and pursuant to resolutions duly adopted by their respective stockholders and their respective Boards of Directors and for their due and proper corporate purposes respectively, and in order to secure payment of the principal and interest of said bonds and to secure the performance and observance of all the covenants and conditions contained in the mortgage hereinafter mentioned, duly made and executed under their respective corporate seals and delivered to the plaintiff (in its then name, Central Trust Company of New York), as Trustee, a mortgage known as the Consolidated Mortgage, dated February 26, 1890 (a copy of which mortgage is
1373 hereto annexed, marked "Exhibit A" and made a part hereof), wherein and whereby Manhattan and Metropolitan did grant, bargain, sell, convey and confirm unto the plaintiff, its successors and assigns, in trust, all property then owned or thereafter acquired by Manhattan or Metropolitan, described or of the nature mentioned in the granting clauses of the mortgage, and reference is hereby made to said granting clauses (set forth on pp. 8 to 22, both inclusive, of the copy of said mortgage annexed hereto as aforesaid) for a particular description of or mention of such property, with the same force and effect as if said granting clauses were herein set forth at length. Among the property described in said mortgage as thus granted, bargained, sold, conveyed and confirmed, is the following:

1374 "NOW, THEREFORE, THESE PRESENTS WITNESS, that the Manhattan Company and the Metropolitan Company, the parties hereto of the first part (in the following clauses described collectively as the Railway Companies), in consideration of the premises and of one dollar to each of them in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained, sold, conveyed and confirmed, and by these presents do grant, bargain, sell, convey and confirm unto the Trustee, its successors and assigns, all and singular their several and re-

spective estates, property, rights, titles, possession, claims and demands, including leasehold or other interests, of, in and to the said system of railroads and each and every part thereof, and all additions thereto and extensions thereof and other property, the same being described as follows:

The elevated railway beginning at Greenwich Street and Battery Place, thence over and across Battery Place to the edge of the Battery and State Street; thence over, through and along the Battery and State Street to Whitehall Street; thence over, through and along Whitehall Street to and including the connection with the South Ferry, Hamilton Avenue Ferry and Staten Island Ferry; thence over, through and along Whitehall Street to Front Street, with the cross-over and turn-out between State Street and Front Street; thence over, through and along Front Street to Coenties Slip; thence over, through and along Coenties Slip to Pearl Street; thence over, through and along Pearl Street, Hanover Square and Franklin Square to the New Bowery; thence over, through and along the New Bowery and Chatham Square to the Bowery; thence over, through and along the Bowery to Third Avenue; thence over, through and along Third Avenue to the terminus of said Railway at or beyond East One hundred and twenty-ninth Street; with the branches and turn-outs, from Chatham Square over, through and along Chatham Street to Park Row; thence over, through and along Park Row to Tryon Row to and including the connection with the East River Bridge; and from Third Avenue and East Thirty-fourth Street over, through and along East Thirty-fourth Street to and including the connection with the Thirty-fourth Street Ferry; and from Third Avenue and East Forty-second Street over, through and along

East Forty-second Street to and including the connection with 'The Grand Central Depot'; Also the elevated railway beginning at Greenwich Street and Battery Place, from and including the connection with the railway above described, over, through and along Greenwich street to Ninth avenue; thence over, through and along Ninth avenue to One Hundred and Tenth street; thence over, through and along One Hundred and Tenth street to Eighth avenue; thence over, through and along Eighth avenue to the Harlem River, including the connection at or about One Hundred and Fifty-fifth street with the line of railway now or late of the New York City and Northern Railway Company; Also the elevated railway beginning at or about Morris street from and including the connection with the railway last above desscribed over, through and along New Church street and Church street to Murray street; thence over, through and along Murray street to College Place; thence over, through and along College Place, Chambers street, West Broadway and South Fifth avenue to Third street; thence over, through and along Third street to Sixth avenue; thence over, through and along Sixth avenue to Central Park, with a branch and turnout from Sixth avenue and West Fifty-third street over, through and along West Fifty-third street to and including the connection with the railway last above described; Also, the elevated railway beginning at Chatham Square from and including the connection with the railway first above described over, through and along Division street, Allen street and First avenue to Twenty-third street; thence over, through and along Twenty-third street to Second avenue; thence over, through and along Second avenue to the terminus of said railway at or about One Hundred and Twenty-ninth street; and all sidings, switches,

crossovers, turnouts and additional tracks forming part of the said railways; and any and all other railway now held by said Railway Companies or either of them or that they or either of them, their successor or successors, may hereafter acquire, whether by construction, purchase, lease, merger, consolidation or otherwise, together with all real estate and personal or other property in any way appertaining thereto.

Including in and as part and parcel of the premises hereby mortgaged, all present and future stations, station houses, engine houses, car houses, freight houses, wood houses, water and coal stations and other buildings, coal-yards, repair, machine and other shops, telegraph, signal and switching apparatus, third and other additional tracks, columns, girders, and supports of said railways, or of any part of them, and the rights, interests and estates of said Railway Companies and of each of them of, in and to the land over or upon which the same may stand; and also all present and future locomotives, stationary and other engines, tenders, cars and other rolling stock, equipment, furniture, machinery, tools, implements, fuel and material, acquired or to be acquired for the purposes of constructing, operating, repairing or replacing the said railways or of any part of them; and all tenements, hereditaments and appurtenances unto said railways or either of them belonging or in anywise pertaining, and all reversion and reversions, remainder and remainders, tolls, income, rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever as well at law as in equity, of said Railway Companies or of either of them, of, in and to the said railways, and to each and every part and parcel thereof, with the appurtenances.

**Also all rights, powers, franchises, licenses, easements and privileges of every description now held or that may hereafter be held or acquired by said Railway Companies or either of them, their successors and successor."**

12. The said mortgage was duly executed, acknowledged and delivered in all respects in conformity with law and plaintiff in its then name, Central Trust Company of New York, duly accepted the trusts created in and by said mortgage before the recording of the same and the same was thereafter duly recorded in the office of the Register of the County of New York in Liber 2538 of Mortgages, page 157, on the 26th day of February, 1890.

13. At the time of the execution and delivery of said mortgage an agreement had been made between Manhattan and Metropolitan for the surrender of the capital stock of Metropolitan and the merger of Metropolitan into Manhattan, but said merger proceedings had not been completed, so that the property of Metropolitan was not then fully owned by Manhattan and therefore Metropolitan joined in said mortgage; but on or about May 7, 1894, the merger of Metropolitan and its properties into Manhattan was fully consummated and thereafter all property of Metropolitan was the property of Manhattan and subject to the aforesaid mortgage with the same force and effect as if owned by Manhattan at the date of said mortgage. Under the provisions of said mortgage, certain bonds were to be issued thereunder in exchange for certain First Mortgage Bonds and Second Mortgage Bonds of Metropolitan, and said exchange has long since been completed and Metropolitan has no interest in the subject-matter hereof.

14. Heretofore and on or about June 13, 1899, and prior to the execution and delivery of the indenture next mentioned, Manhattan, pursuant to due and lawful authority

and to due corporate action of its stockholders and its Board of Directors, duly made and executed under its corporate seal and delivered to plaintiff (in its then name, Central Trust Company of New York) an indenture supplemental to the aforesaid mortgage, by which supplemental indenture dated June 13, 1899 (a copy of which is hereto annexed marked "Exhibit B" and made a part hereof), the provisions of said mortgage were modified to permit the issuance of registered bonds (said mortgage as supplemented by said supplemental indenture being the Consolidated Mortgage under which since June 13, 1899, plaintiff has been acting and is now acting as Trustee). The said supplemental indenture was duly executed, acknowledged and delivered in all respects in conformity with law and plaintiff (in its then name, Central Trust Company of New York) duly accepted the trusts created in and by said supplemental indenture before the recording of the same, and said supplemental indenture was thereafter duly recorded in the office of the Register of the County of New York in Block Series Liber 7, General Mortgages, page 265, on the 12th day of July, 1899.

15. Plaintiff, as the result of proceedings duly taken pursuant to the statutes of the State of New York, and in connection with the merger into Central Trust Company of New York of Union Trust Company of New York, a New York banking corporation, duly changed its name from Central Trust Company of New York to Central Union Trust Company of New York, effective June 18, 1918, and subsequently and effective May 15, 1929, in connection with the merger of The Hanover Bank of the City of New York, a New York banking corporation, into said Central Union Trust Company of New York, plaintiff duly changed its name to Central Hanover Bank and Trust Company, and since said last mentioned date it has been doing business under the last mentioned name. Plaintiff under its prior names and under its present name continuously has been and it now is acting as the Trus-

tee, at first under the aforesaid mortgage, until supplemented as aforesaid, and thereafter under said Consolidated Mortgage.

16. Subsequent to February 26, 1890, and prior to the date of filing this bill of complaint, plaintiff as Trustee, at first under the aforesaid mortgage and then under the Consolidated Mortgage and in conformity with the terms thereof, did duly authenticate $40,676,000 principal amount of bonds in the form provided for in the Consolidated Mortgage, all of which bonds had been theretofore duly executed by Manhattan pursuant to due
391 corporate action and authority of law. Each and all of said bonds were duly delivered by the plaintiff and were duly issued with the appurtenant coupons and are now outstanding and have since been, and now are, the lawfully created, valid and existing obligations of Manhattan in the hands of *bona fide* holders thereof for value and secured by the aforesaid Consolidated Mortgage. In addition, there are held by plaintiff, as Trustee under the Consolidated Mortgage, $7,000 in principal amount of said bonds for delivery in exchange for a like amount of outstanding Registered Bond Certificates of Manhattan, as provided in said Consolidated Mortgage.

17. In and by the granting clauses of the aforesaid
392 mortgage, there were granted, bargained, sold, conveyed and confirmed unto the Trustee the "tolls, income, rents, issues and profits" of the mortgaged property.

18. In and by said mortgage, Manhattan covenanted and agreed, in Article Ninth thereof, as follows (the "Railway Companies" therein mentioned being Manhattan and Metropolitan herein):

> "NINTH.— * * * Until the interest and principal of said bonds shall be fully paid, said Railway Companies, their successor and successors,

shall promptly pay all taxes, assessments or other like charges lawfully laid, charged or imposed upon the mortgaged premises or any part thereof, including the property represented by any stocks, bonds or other like muniments or evidence of ownership deposited with or held by the Trustee as aforesaid, which may become prior to the lien of these presents; and that upon default by the said Railway Companies, or either of them, to pay any taxes, assessments or other like charges assessed or laid upon them, or either of them, or upon their property, whereby the lien of these presents might become impaired, the Trustee may, if so advised, and without impairment of or prejudice to any of its rights under this mortgage by reason of such default, itself pay the said taxes, assessments or other like charges, and have a lien upon the mortgaged premises for its advances for that purpose."

19. In and by said mortgage it was provided, in Articles First, Second, Third and Fourth, in part as follows:

"FIRST.—That until default in the payment of any interest or principal of the bonds hereby secured or of any of them, or until default by the Railway Companies or either of them, in some act or thing herein required to be kept, done or performed by them or either of them, they shall possess, use and enjoy the premises hereby mortgaged and have and receive the rents, issues and profits thereof.

"SECOND.—That upon any and every default in the payment of any interest of the bonds hereby secured, or of any of them, as and when the same shall fall due, and the continuance of such default for sixty days, or upon any and every default by said Railway Companies or either of them in any other act or thing herein required to be kept, done or performed by them or either of them, then and

in every such case the Trustee may, and upon the request in writing of the holders of a majority in amount of the bonds hereby secured at the time outstanding, and upon being indemnified to its satisfaction against all costs and expenses of compliance with such request, the Trustee shall, enter upon and take possession of and hold, use, occupy, operate and enjoy the premises hereby mortgaged and each and every part thereof, and receive the rents, issues and profits thereof, and said Railway Companies shall permit and suffer the same, and the Trustee, after first paying thereout its expenses
1397 of such entry, use, occupation, operation and enjoyment, including all taxes and other like charges and the cost of all repairs, betterments and improvements in its judgment necessary and expedient, and a reasonable compensation to the Trustee, shall apply the balance thereof to the satisfaction of any and all interest upon the bonds hereby secured at the time in default or accruing during such occupation, in the order in which the coupons therefor shall have matured, but without preference of one coupon over another of the same due date, and upon payment of all such arrears of interest shall restore possession of the mortgaged premises to the Manhattan Company, together with
1398 any surplus of such rents, issues and profits then remaining, to be by it held subject to this mortgage.

"THIRD.—That upon any and every such default in the payment of any interest of the bonds hereby secured or of any of them, and its continuance as aforesaid, or upon any and every such default by said Railway Companies or either of them in any other act or thing herein required to be kept, done or performed by them or either of them, the holders of a majority in amount of the bonds hereby secured at the time outstanding may, by writing to be delivered to the Trustee, declare the principal

of all the bonds hereby secured to be, and the same shall thereupon become, immediately due and payable; and upon any and every such default in the payment of any interest of the bonds hereby secured, or of any of them and its continuance as aforesaid, or upon any and every default in the payment of the principal of any of the bonds hereby secured as herein provided, or upon any and every such default by said Railway Companies or either of them in any other act or thing herein required to be kept, done or performed by them or either of them, then and in every such case the Trustee may, and, upon the request in writing of the holders of a majority in amount of the bonds hereby secured at the time outstanding, and upon being indemnified to its satisfaction against all costs and expenses to be incurred by it in complying with such request, the Trustee shall, with or without entry as aforesaid, proceed to sell and shall sell to the highest bidder therefor at public auction in the City of New York, the right, title, interest and estate of the Manhattan Company of, in and to the mortgaged premises, * * *.

"Fourth.—That, in lieu of the proceedings hereinabove described, upon any and every such default in the payment of any interest of the bonds hereby secured or of any of them, and its continuance as aforesaid, or upon any and every such default in the payment of the principal of any of the bonds hereby secured as herein provided, or upon any and every such default by the Railway Companies or either of them, in any other act or thing herein required to be done, kept or performed, by them or either of them, the Trustee may, in its discretion, and, if so directed in writing by the holders of a majority in the amount of the bonds hereby secured at the time outstanding shall, proceed by action, suit or other proper legal proceeding to foreclose

this mortgage and seek the appointment of a Receiver or Receivers of the mortgaged premises and of the rents, issues and profits thereof, who may be nominated for that purpose by such holders of said bonds; and the several remedies in these presents specified are cumulative and not exclusive one of the other. * * * No holder or holders of a bond or bonds hereby secured or of any interest coupons thereof shall have the right to institute any suit, action or proceeding in equity or at law for the foreclosure of these presents or the execution of the trusts hereof or for the appointment of a receiver of the premises hereby mortgaged or any part thereof, without having first given notice in writing to the Trustee of the fact that the default has occurred and requested the Trustee to proceed with all lawful remedies, and afforded it a reasonable opportunity to proceed to exercise the powers granted to it by these presents and to institute such suit, action or proceeding in its own name as may in its judgment be adapted to that end, * * *."

20. Plaintiff is informed and believes and therefore alleges that subsequent to the execution and delivery of the aforesaid mortgage, Manhattan entered into a certain Lease dated January 1, 1903, with Interborough and by said Lease (which was recorded in the Register's office, County of New York, on April 1, 1903, in Liber 2 of Conveyances, pp. 35 *et seq.*) Manhattan did lease and demise to Interborough all its right, title and interest in and to the property described in said lease, including generally all the railroads owned or operated by the lessor and constructed or to be constructed or acquired under its charter or in its right during the continuance of the lease, together with the emoluments, revenues, income, rents, issues and profits thereof, and all franchises and all cars, locomotives, engines, tools, implements, supplies, machinery, railroad equipments, power stations, electrical appliances and

equipments, and all privileges, easements, rights, fixtures, personalty and property, real, personal or mixed, of every nature or description, then owned or thereafter acquired, excepting generally such property as franchises necessary to preserve corporate existence. The said property was so leased for the term of 999 years from November 1, 1875, or so long as the lessee and its successors should continue to exist as a corporation and be capable of exercising all the functions therein stipulated on its behalf.

21. Plaintiff is informed and believes and therefore alleges that in May, 1932, there were lawfully laid, charged and imposed upon the mortgaged premises, or parts thereof, certain special franchise taxes and real estate taxes in amounts aggregating upwards of $780,000. Under the aforesaid Lease Interborough agreed to pay any and all taxes which during the terms of the Lease should be levied upon the leased property. In the bill of complaint in the above mentioned cause brought by the American Brake Shoe and Foundry Company, it is alleged, and by the answer of Interborough therein it is admitted, that certain taxes amounting with interest to over $860,000 have been duly assessed by the City of New York against special franchises and real estate belonging to Manhattan, and have not been paid; and Manhattan has heretofore notified Interborough that said special franchise taxes and real estate taxes amounting to upwards of $780,000 were due and payable on May 31, 1932, and has demanded that they be paid.

22. No part of the aforesaid taxes has been paid by Manhattan or by anyone else and such non-payment constitutes a default under the Consolidated Mortgage and such default still wholly continues.

23. By reason of the matters hereinbefore set forth, plaintiff is now entitled forthwith to proceed to protect and enforce its rights and the rights of the holders of the bonds and coupons secured by said Consolidated Mort-

gage, including the right to proceed by this bill of complaint or to take any other appropriate remedies, and including the right, if the mortgaged premises were not in the possession of this Court, to enter upon and take possession of the mortgaged premises and receive the rents, issues and profits thereof or by a receiver to take possession of the mortgaged property and of the tolls, income, rents, issues and profits thereof.

24. Under the aforesaid Lease Interborough took possession of substantially all of the property of Manhattan, all of which property so taken by Interborough is subject to the lien of the Consolidated Mortgage. This Court by its aforesaid order dated September 6, 1932, appointing the Manhattan Receiver provided (in addition to the provisions for reservation of the *status quo ante*) that the rights, powers and duties of the Manhattan Receiver should be "subject to all the rights of the defendant Interborough Rapid Transit Company and its Receivers under all leases and agreements between Interborough Rapid Transit Company and Manhattan Railway Company" and that nothing contained in said order should be deemed "to put the said Receiver of Manhattan Railway Company into physical possession of any properties now properly in the possession of the said Receivers of Interborough Rapid Transit Company under the order appointing them." Said mortgaged property is now in the possession of this Court as aforesaid and this Court has rendered the plaintiff unable to take possession thereof, or of the tolls, income, rents, issues and profits thereof; but plaintiff is now entitled, as of the date of the filing of this bill of complaint, and plaintiff hereby asserts its right as of said date, to have impounded during the continuance of default, for the benefit of this Trustee and the holders of the bonds and coupons secured by said Consolidated Mortgage, all said tolls, income, rents, issues and profits which on and after said date shall come into possession of the Interborough Receivers and/or any other person who shall be appointed

by this Court as receiver of the property of Interborough (including property leased to it by Manhattan) and/or Interborough and/or the Manhattan Receiver and/or any other person who shall be appointed by this Court as receiver of the property of Manhattan and/or Manhattan (without waiver of any claim of plaintiff to tolls, income, rents, issues and profits accruing prior to filing of this bill of complaint); and plaintiff is now entitled to the appointment of a receiver as hereinafter prayed for.

This Court has not as yet determined whether the receivers of the property of Interborough shall adopt the said Lease or shall reject it; in fact, it has not as yet been determined whether under the circumstances this Court has the power or authority to order the rejection of the Lease by the receivers. If the Lease shall be adopted the full stipulated rental will be payable by Interborough or the receivers of its property. If the leased property shall be returned to Manhattan or the receiver of its property, there will be payable by the Interborough or its receivers, at the minimum, the entire net earnings, properly to be computed, of the Manhattan property while held by Interborough receivers; or, as plaintiff is informed and believes and therefore alleges, there may be payable in such event by Interborough or its receivers an amount equal to the full rental stipulated in said Lease, or some other amount which should largely exceed the amount of said net earnings, in view of the fact that the operation of the property of Manhattan is very beneficial to Interborough and to the property owned by it and held by the Interborough receivers and in view of the further fact that the Manhattan property has a far greater value to the Interborough property while in the possession of Interborough or Interborough receivers than the amount of the net earnings of the property of Manhattan. If the full rental under said Lease shall be paid and all defaults under the Consolidated Mortgage shall be duly cured the lien hereby perfected upon the tolls, income, rents, issues and profits may be released, but whether in the future Interborough receivers shall

adopt or shall reject said Lease, and whether or not possession of the Manhattan property shall for any reason be returned to the Manhattan or its receiver, the plaintiff during the continuance of default under the aforesaid Consolidated Mortgage is entitled to the present impounding of the tolls, income, rents, issues and profits of the mortgaged property of Manhattan while in the possession of Interborough receivers and/or Interborough and/or a Manhattan receiver and/or Manhattan. Neither the relief effected nor the relief sought by the filing of this bill of complaint is intended in any way to affect or abrogate said Lease. However, the plaintiff does not waive, by any-
415 thing in this bill of complaint contained or otherwise, any right at any time hereafter to apply to this Court for directions to Interborough receivers and/or Manhattan receivers in respect of said Lease and/or the leased property or any part thereof, or to take any other action in respect thereto or for the enforcement of its rights and the rights of the holders of the bonds and coupons secured by said Consolidated Mortgage.

25. Substantially the only source of income to Manhattan during the continuance of the aforesaid Lease consists of payments provided to be made by Interborough thereunder. Interborough has already defaulted in the payment of a large amount of taxes payable as rental
416 thereunder. No intention has been indicated that Interborough or Interborough receivers will cure the existing default in respect of the non-payment of said taxes, or will continue to make the payments provided for in said Lease, or are about to return the leased premises. In the bill of complaint in the aforesaid cause brought by The American Brake Shoe and Foundry Company, it is alleged, and by the answer of Interborough therein it is admitted, that the Interborough has obligations presently due or about to become due in the amount of many millions of dollars, including floating indebtedness to the amount of over $2,500,000, which floating indebtedness is overdue, and that the defendant is unable even to pay said floating

indebtedness without consideration of the many millions of dollars of other indebtedness now due or about to become due, including rental payments under the aforesaid Lease in large amount due on October 1, 1932.

Manhattan has no funds with which to pay the aforesaid defaulted taxes, or any substantial part thereof. Furthermore, on October 1, 1932, there will be due and payable upon the bonds secured by the Consolidated Mortgage a semi-annual installment of interest at the rate of 4% per annum. Manhattan has outstanding not only the aforesaid bonds secured by the Consolidated Mortgage but also, as plaintiff is informed and believes and therefore alleges, 14
approximately $4,523,000 in principal amount of Second Mortgage Bonds secured by a certain Second Mortgage dated June 1, 1913, under which the defendant, The Chase National Bank of the City of New York, is Trustee. Under said Consolidated Mortgage and under said Second Mortgage, the failure to pay the aforesaid taxes due in May, 1932, constitutes a default, in consequence of which the principal of all the bonds outstanding under said mortgages may be declared to be due and payable as in said mortgages provided. Manhattan is unable to pay its debts and obligations as the same mature; and, by reason of the matters hereinbefore set forth, the security for the aforesaid Consolidated Mortgage is being wasted, impaired and endangered to the irreparable injury of plaintiff and of the holders of the bonds and coupons secured by said Consoli- 141
dated Mortgage, and there is grave danger that a large part of the security for the Consolidated Mortgage will be lost. By reason of the matters hereinbefore set forth, including particularly the accrual of taxes in large amounts which are not being paid, the sufficiency of the mortgaged property to secure the payment of the debt secured by the Consolidated Mortgage has become substantially doubtful and inadequate.

26. No proceedings have been had at law or in equity for the collection of said mortgage debt or any part thereof, or for the protection and enforcement of any of the rights

of the Trustee under said Consolidated Mortgage or of the holders of the bonds or coupons secured thereby, except this bill of complaint. Upon application of this plaintiff leave has been granted to it to include as defendants herein the Interborough Receivers and the Manhattan Receiver.

27. In consequence of the embarrassed condition of the financial affairs of Manhattan and of Interborough, and on account of the many difficulties and complications which are manifest upon and from the facts hereinbefore set forth, it is impossible for the plaintiff as Trustee under said Consolidated Mortgage adequately to execute its said
1421 trust and to protect the rights of the holders of said bonds and coupons without the interposition of this Honorable Court in equity sitting.

WHEREFORE, and inasmuch as this plaintiff can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable, this plaintiff prays:

(1) that the said defendants be required to make answer respectively unto all and singular the matters hereinbefore stated and charged, but not under oath, answer under oath being hereby expressly waived;

(2) that an account be taken of all property sub-
1422 ject to the lien of said Consolidated Mortgage, and that said Consolidated Mortgage be decreed to be a valid lien upon all and singular the elevated lines, elevated routes, estates, leaseholds, properties, premises, rights, privileges and franchises and generally all property of every kind therein described and thereby intended to be mortgaged (save and except such property as may have been duly released from the lien thereof), that an account be had of all improvements, additions and extensions made since the execution of said Consolidated Mortgage upon any of said elevated lines or routes or property, real or

personal, and of any and all cars, carriages, tools, chattels, machinery, motors, engines and equipment of every description used or employed upon said elevated lines or routes or other mortgaged property or acquired for use upon or in connection with the same or any part thereof and generally of all property of every kind which has become a part of the security for said Consolidated Mortgage since the execution thereof, and that said Consolidated Mortgage may be declared to be a valid lien upon all such property, with the tolls, income, rents, issues and profits thereof;

(3) that a receiver be appointed, with the usual powers of receivers in like cases, of the property of every kind which is subject to the lien of said Consolidated Mortgage, and of the tolls, income, rents, issues and profits thereof, including the right, title and interest of Manhattan Railway Company as lessor under the Lease dated January 1, 1903, between Manhattan Railway Company and Interborough Rapid Transit Company, and that such directions may be made with respect to such receivership as may be equitable and proper; provided, however, that the order entered in respect of this complaint shall not affect or abrogate said Lease dated January 1, 1903, and provided, further, that nothing contained in any such order shall affect or prejudice the right of plaintiff at any time to apply to this Court for directions to any receiver of the property of Interborough Rapid Transit Company and/or any receiver of the property of Manhattan Railway Company in respect of said Lease and/or leased property or any part thereof, or to take any other action in respect thereto or for the enforcement of its rights and the rights of the holders of the bonds and coupons secured by said Consolidated Mortgage;

1426

(4) that all tolls, income, rents, issues and profits of the mortgaged property (constituting, until otherwise determined, all property of Manhattan Railway Company) which tolls, income, rents, issues and profits shall hereafter come into the possession of the Interborough Receivers and/or any other receiver of the property of Interborough and/or Interborough and/or the Manhattan Receiver and/or any other receiver of the property of Manhattan and/or said Manhattan be impounded as of the date of the filing of this bill of complaint (without waiver of any claim of plaintiff to tolls, income, rents, issues and profits, accruing prior to the filing of this bill of complaint) for the benefit of this plaintiff, as Trustee as aforesaid, and of the holders of bonds and coupons secured by the aforesaid Consolidated Mortgage, and be applied to and for such benefit, subject only to such expenses as may lawfully and properly be incurred in the operation and preservation of said property, having due regard for the rights of said Trustee and of the holders of said bonds and coupons and for the protection of the security of said mortgage lien;

1427

(5) that the Interborough Receivers and any other receiver of the property of Interborough and the Manhattan Receiver and any other receiver of the property of Manhattan be directed to account for and from time to time pay over to the receiver to be appointed in this cause, the entire net earnings of the property, in the possession of them or any of them, which is subject to the lien of the aforesaid Consolidated Mortgage, provided, however, that any receiver of the property of Interborough shall not be required to pay over to the receiver to be appointed in this cause an amount exceeding the rental payable under said Lease dated January 1, 1903, for so long a time as said Lease may continue in force;

1428

(6) that plaintiff may have such other and further relief in the premises as the nature of the case may require and as may be in accordance with equity.

May it please your Honors to grant to plaintiff a writ or writs of subpoena to be directed to the said defendants Manhattan Railway Company, Interborough Rapid Transit Company, Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of the property of Interborough Rapid Transit Company, William Roberts, as Receiver of the property of Manhattan Railway Company, The Chase National Bank of the City of New York, as Trustee under Second Mortgage of Manhattan Railway Company, and The American Brake Shoe and Foundry Company, commanding them and each of them at a certain time and under a certain penalty therein to be named, to be and appear before your Honors in this Honorable Court, then and there severally to answer all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived, and to abide by and perform such other and further orders or decrees as to your Honors shall seem meet.

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee,
By F. WOLFE,
Asst. Vice-President.

(Seal)

Attest:

J. T. HARRIGAN,
Assistant Secretary.

DAVIES, AUERBACH & CORNELL,
Solicitors for Plaintiff.

EDWARD CORNELL,
H. C. MCCOLLOM,
Of Counsel.

Doc. 54

## Bond of William Roberts, Receiver of Manhattan Railway Company.

AMERICAN SURETY COMPANY OF NEW YORK
Organized 1884

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IN THE

DISTRICT COURT OF THE UNITED STATES

1433

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |
| IN THE MATTER OF 1434 The Petition of MANHATTAN RAILWAY COMPANY. | |

KNOW ALL MEN BY THESE PRESENTS, that WILLIAM ROBERTS, of 233 Broadway, New York City, as Principal and the American Surety Company of New York, having an office and principal place of business at No. 100 Broadway, Borough of Manhattan, in the City of New York, State of New York, as Surety, are held and firmly bound

unto the United States of America in the sum of one hundred thousand ($100,000.00) Dollars, lawful money of the United States, to be paid to the said United States of America, for which payment well and truly to be made, the said WILLIAM ROBERTS binds himself, his heirs, executors and administrators and said surety company binds itself, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 6th day of September, 1932.

WHEREAS by an order made by Hon. Martin T. Manton, United States District Judge, dated the 6th day of September, 1932, the said William Roberts was appointed, with the usual powers, Receiver of the property of Manhattan Railway Company and was authorized to enter upon the discharge of his duties as such Receiver upon giving the bond by said order required.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, if the said William Roberts shall in all events well and truly perform the duties of their office and duly account for all moneys or property which shall come into their hands as such Receivers, then this Obligation to be void; otherwise it shall remain in full force and effect.

WILLIAM ROBERTS (L. S.)

AMERICAN SURETY COMPANY OF NEW YORK,
By W. SCOTT REIG, (L. S.)
Attorney-in-Fact.

(L. S.)

Witness:
DUANE R. DIEN

1438 *American Brake Shoe Record.*
*Bond of William Roberts—Manhattan Receiver.*

COUNTY OF NEW YORK, }
STATE OF NEW YORK, } ss.:

On this 6th day of September, 1932, before me personally appeared W. Scott Reig, who, being by me duly sworn did depose and say that he resides in New York City, that he is the Attorney-in-Fact of the AMERICAN SURETY COMPANY OF NEW YORK, the corporation described in and which executed the above instrument, that he knows the corporate seal of said corporation, that the seal affixed to said instrument is such corporate seal, that it was so affixed by order of the Board of Trustees of the said corpo-
1439 ration, and that he signed his name to the said instrument by like order, that the said Corporation is organized, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has complied with all the requirements of said laws applicable to surety companies, and is duly qualified to act as surety under the laws of said State, and is worth more than Six Million Dollars ($6,000,000) exclusive of property exempt from execution, and above and over the amount of all its debts and liabilities or other encumbrances, and that said property consists of cash, real estate, municipal and railroad bonds and stocks, which are lawful investments for said corporation.

W. SCOTT REIG.

1440 Sworn to before me this
6th day of September, 1932.

DOROTHY E. MEINTZER,
Notary Public, New York County.
New York County Clerk's No. 462.
Term expires March 30th, 1934.

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The within bond is hereby approved.

MANTON,
*U. S. Circuit Judge, sitting by assignment in the District Court for the Southern District of New York.*

Doc. 55

## Bond of Thomas E. Murray, Jr., Receiver of Interborough Rapid Transit Company.

AMERICAN SURETY COMPANY OF NEW YORK

Capital $5,000,000

LIMITED POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS:

That the AMERICAN SURETY COMPANY OF NEW YORK, a corporation of the State of New York, of No. 100 Broadway, in the City of New York, in said State, has made, constituted and appointed, and by these presents does hereby make, constitute and appoint LEON SEKESON its true, sufficient and lawful attorney, with full power and authority to make, execute and deliver, for it, in its name and in its behalf, as surety, a bond or undertaking, as follows: in behalf of any Receiver or Receivers appointed for Interborough Rapid Transit Company in any action or proceeding in the United States District Court for the Southern District of New York, not exceeding the sum of Five Hundred Thousand Dollars ($500,000.00)—hereby giving its said attorney full power and authority to do everything whatsoever requisite and necessary to be done for the purpose of making, executing and delivering such obligations as fully as the officers of said American Surety Company of New York could do if personally present, and hereby ratifying and confirming all that its said attorney shall lawfully do or cause to be done by virtue hereof, but reserving to itself full power of substitution and revocation.

The authority contained herein is void if not availed of within thirty days from the date of this instrument.

1444 *American Brake Shoe Record.*
*Bond of T. E. Murray, Jr., I. R. T. Receiver.*

IN WITNESS WHEREOF, the said American Surety Company of New York has caused its corporate seal to be hereunto affixed and these presents to be duly executed by its proper officers at the City of New York, State of New York, on this 25th day of August, 1932.

AMERICAN SURETY COMPANY OF NEW YORK,
By MARSHALL L. BROWER,
(L. S.) Resident Vice-President.

Attest:

1445 WILLIAM WISHART, JR.,
Resident Assistant Secretary.

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At a regular meeting of the Executive Committee of the Board of Trustees of the American Surety Company of New York, held at the office of the Company at No. 100 Broadway, in the City of New York, on the twelfth day of April, 1927, the following resolution was adopted:

"*Resolved,* That one of the Resident Vice-Presidents and one of the Resident Assistant Secretaries of this Company at New York, in the State of New York, be and they hereby are authorized and empowered to make, execute and deliver, in behalf of
1446 the Company, unto such person or persons in the State of New York, as they may select, its power of attorney constituting and appointing each such person its Attorney in Fact, with full power and authority to make, execute and deliver, for it, in its name and in its behalf, as surety, any particular bond or undertaking that may be required in the said State of New York, the nature of such bond or undertaking to be in each instance specified in such power of attorney."

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

I, I. C. CLARK, Assistant Secretary of the American Surety Company of New York, hereby certify that I have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company at the City of New York, this 25th day of October, 1928.

I. C. CLARK,
Assistant Secretary.

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STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this day personally appeared before me, a Notary Public, in and for the County aforesaid, MARSHALL L. BROWER and WILLIAM WISHART, JR., who, being duly sworn by me, did depose and say that they are respectively a Resident Vice-President and a Resident Assistant Secretary, at the City of New York, of the American Surety Company of New York; and they, as such Resident Vice-President and Resident Assistant Secretary, respectively, did thereupon acknowledge and deliver the foregoing instrument of writing as and for the act and deed of the American Surety Company of New York.

Witness my hand and seal, this 25th day of August, 1932.

DOROTHY E. MEINTZER,
Notary Public, New York County.
New York County Clerk's No. 462.
(L. S.) Term expires March 30th, 1934.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

C. H. HALL, being duly sworn, says: That he is an Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws; that said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," as amended; that the within is a true copy of the last statement of the resources and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than $7,500,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

C. H. HALL (L. S.)

Subscribed and sworn before me
this 25th day of August, 1932.

B. L. REHBERGER,
Notary Public, Kings County.
Certificate filed in all Counties.
(L. S.) Kings Co. Clerk's No. 510, Reg. No. 3137.
Bronx Co. Clerk's No. 21, Reg. No. 76-R-33.
New York Co. Clerk's No. 329, Reg. No. 3-R-223.
My Commission expires March 30, 1933.

(Financial Statement as of December 31, 1931, hereto attached.)

*American Brake Shoe Record.* 14
*Bond of T. E. Murray, Jr., I. R. T. Receiver.*

AMERICAN SURETY COMPANY OF NEW YORK
Organized 1884

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

against 145

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

KNOW ALL MEN BY THESE PRESENTS, that THOMAS E. MURRAY, JR., of the City of New York, as Principal, and the AMERICAN SURETY COMPANY OF NEW YORK, having an office and principal place of business at No. 100 Broadway, Borough of Manhattan, in the City of New York, State of New York, as Surety, are held and firmly bound unto the United States of America in the sum of One Hundred Thousand ($100,000) Dollars, lawful money of the United States, to be paid to the said United States of America, for which payment well and truly to be made, 1455
the said Thomas E. Murray, Jr., binds himself, his heirs, executors and administrators, and said surety company binds itself, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 26th day of August, 1932.

WHEREAS, by an order made by Hon. Martin T. Manton, United States Circuit Judge, dated the 26th day of August, 1932, the said Thomas E. Murray, Jr., was appointed,

with the usual powers, Equity Receiver of the property of Interborough Rapid Transit Company, jointly with Hon. Victor J. Dowling, and was authorized to enter upon the discharge of his duties as such Equity Receiver upon giving the bond by said order required.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said Thomas E. Murray, Jr., shall in all events well and truly perform the duties of his office and duly account for all moneys or property which shall come into his hands as such Receiver, then this obligation to be void; otherwise it shall remain in full force and effect.

THOMAS E. MURRAY, JR. (L. S.)

AMERICAN SURETY COMPANY OF NEW YORK,
By LEON SEKESON, (L. S.)
(L. S.) Attorney-in-Fact.

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COUNTY OF NEW YORK, } SS.:
STATE OF NEW YORK, }

On this 26th day of August, 1932, before me personally appeared LEON SEKETON, who, being by me duly sworn, did depose and say that he resides in New York City, that he is the Attorney-in-Fact of the American Surety Company of New York, the corporation described in and which executed the above instrument, that he knows the corporate seal of said corporation, that the seal affixed to said instrument is such corporate seal, that it was so affixed by order of the Board of Trustees of the said corporation, and that he signed his name to the said instrument by like order, that the said corporation is organized, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has complied with all the requirements of said laws applicable to surety companies, and is duly qualified to act as surety under the laws of said State, and is worth more than Six

Million Dollars ($6,000,000), exclusive of property exempt from execution, and above and over the amount of all its debts and liabilities or other encumbrances, and that said property consists of cash, real estate, municipal and railroad bonds and stocks, which are lawful investments for said corporation.

LEON SEKESON.

Sworn to before me this
26th day of August, 1932.

DOROTHY E. MEINTZER,
Notary Public, New York County.
New York County Clerk's No. 462.
(L. S.) Term expires March 30, 1934.

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UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

On this 26th day of August, 1932, before me personally appeared the within named THOMAS E. MURRAY, JR., to me known, and known to me to be the individual described in and who executed the within bond, and he duly acknowledged to me that he executed the same.

ARTHUR G. PEACOCK,
Notary Public, Queens County.
Certificate filed in New York County, No. 300.

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The within Bond is hereby approved.

MARTIN T. MANTON,
*U. S. Judge.*

(Filed August 26, 1932.)

Doc. 56

## Bond of Victor J. Dowling, Receiver, Interborough Rapid Transit Company.

AMERICA EMPLOYERS' INSURANCE COMPANY
of Boston, Mass.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, vs. INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | Receiver in Equity #70-364 |

The undersigned, VICTOR J. DOWLING, of 25 Broadway, New York, N. Y., as principal, and the AMERICAN EMPLOYERS' INSURANCE COMPANY, a Massachusetts corporation, organized and existing under the Laws of the Commonwealth of Massachusetts, and authorized to do business in the State of New York, having an office at 81 John Street, New York, N. Y., as surety, are jointly and severally held and firmly bound unto the UNITED STATES OF AMERICA in the penal sum of One Hundred Thousand and 00/100 ($100,000.00) Dollars, lawful money of the United States of America, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors and assigns, jointly and severally, firmly by these presents.

SIGNED and SEALED this 29th day of August, 1932.

THE CONDITION OF THE FOREGOING OBLIGATION IS SUCH, that whereas the above named Victor J. Dowling and Thomas E. Murray were on the 26th day of August, 1932, by decree of the said District Court of the United States, appointed Receivers in the above entitled case of all and singular the property, assets and credits of INTERBOROUGH RAPID TRANSIT COMPANY, defendant.

NOW, THEREFORE, if the said Victor J. Dowling shall in all events well and truly perform the duties of his office and truly account for all moneys or property which shall come into his hands as such Receiver, then this obligation to be void, otherwise it shall remain in full force and effect.

VICTOR J. DOWLING.
AMERICAN EMPLOYERS' INSURANCE COMPANY,
By A. I. MICHELSEN,
Attorney-in-fact.

(Corporate Seal)

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STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On the 8th day of August, 1932, before me personally appeared VICTOR J. DOWLING, to me known and known to me to be the person described in and who executed the foregoing instrument, and he thereupon acknowledged to me that he executed the same.

M. S. LICHENSTADTER,
Notary Public, New York County.
Certificates filed in Counties of
New York Co. Clerk's No. 148, Reg. No. 4 L 353.
Kings Co. Clerk's No. 160, Reg. No. 4258.
Bronx Co. Clerk's No. 31, Reg. No. 124 L 34.
Queens Co. Clerk's No. 622, Reg. No. 2884.
Commission expires March 30, 1934.

*American Brake Shoe Record.*
*Bond of V. J. Dowling, I. R. T. Receiver.*

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this 29th day of August, 1932, before me personally appeared A. I. MICHELSEN, Attorney-in-fact of the AMERICAN EMPLOYERS' INSURANCE COMPANY, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of Kings; that he is an Attorney-in-fact of the American Employer's Insurance Company, the Corporation described in and which executed the within instrument; that he knows the corporate seal of said Corporation; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Corporation, and that he signed said instrument as an Attorney-in-fact of said Corporation by like authority, and that the Superintendent of Insurance of the State of New York has, pursuant to Chapter 33 of the Laws of the State of New York for the year 1909 constituting Chapter 28 of the Consolidated Laws of the State of New York known as the Insurance Law, as amended by Chapter 182 of the Laws of the State of New York for the year 1913, issued to the American Employers' Insurance Company his certificate that said Corporation is qualified to become and be accepted as surety or guarantor on all bonds, undertakings, recognizances, guaranties and other obligations required or permitted by law, and that such certificate has not been revoked.

E. R. PRESCOTT,
Notary Public, New York County.
N. Y. Co. Clks. No. 311, Reg. No. 3 P 432.
Kings Co. Clks. No. 82, Reg. No. 3281.
Bronx Co. Clks. No. 47, Reg. No. 132 P 33.
Queens Co. Clks. No. 1283, Reg. No. 9006.
(Seal) Commission expires March 30, 1933.

COPIES OF RESOLUTIONS.

At a meeting of the Board of Directors of the American Employers' Insurance Company, a corporation organized and existing under the laws of the Commonwealth of Massachusetts duly called and held on the 29th day of May, 1923, a quorum being present, the following resolutions were adopted:

"That the President, or, in his absence, any Vice-President, may from time to time appoint Attorneys-in-fact to represent and act for and on behalf of the corporation as respects its surety and fidelity business, and that the President, or in his absence, any Vice-President may at any time remove any such Attorney-in-fact and revoke all power and authority given to any such Attorney-in-fact."

"That all bonds, recognizances, contracts of indemnity, and all other writings obligatory in the nature thereof shall be signed by the President, a Vice-President or an Attorney-in-fact and shall have the seal of the company affixed thereto, duly attested by the Secretary, an Assistant Secretary or an Attorney-in-fact."

"That Attorneys-in-fact may be given full power and authority to execute for and in the name of and on behalf of the corporation any and all bonds, recognizances, contracts of indemnity, and all other writings obligatory in the nature thereof, and any such instrument executed by any such Attorney-in-fact shall be as binding upon the corporation as if signed by the President and sealed and attested by the Secretary, and, further, Attorneys-in-fact are hereby authorized to verify any affidavits required to be attached to bonds, recognizances, contracts of indemnity and all other writings obligatory in the nature thereof, and are, also, authorized and empowered to certify to a copy of any of the by-laws

of the corporation, as well as any resolution of the Directors having to do with the execution of bonds, recognizances, contracts of indemnity, and all other writings obligatory in the nature thereof, or with regard to the powers of any of the officers of the corporation or of Attorneys-in-fact."

I, A. I. MICHELSEN, Attorney-in-fact of the AMERICAN EMPLOYERS' INSURANCE COMPANY, do hereby certify that the foregoing are true copies of resolutions of the Board of Directors of the American Employers' Insurance Company relating to the execution of bonds, undertakings, recognizances, contracts of indemnity and all other writings obligatory in the nature thereof, and all of the said resolutions, and that said resolutions are still in force.

Given under my hand and the seal of the Corporation, in the County of New York, State of New York, this 29th day of August, 1932.

A. I. MICHELSEN,
Attorney-in-fact.

(Seal)

## AMERICAN EMPLOYERS' INSURANCE COMPANY
OF BOSTON, MASS.

EDWARD C. STONE, President
Financial Statement, December 31, 1931,
as Filed with Massachusetts Insurance Department

### ASSETS

| | |
|---|---|
| Bonds and Stocks valued on basis approved by the National Convention of Insurance Commissioners | $5,720,729.00 |
| Cash on Hand and in Banks | 217,032.89 |
| Premiums in Course of Collection, not over Three Months Due | 825,027.63 |
| Due from Reinsurance Companies | 25,891.02 |
| Equity in The Workmen's Compensation Reinsurance Bureau Fund | 39,075.85 |
| Interest Due and Accrued | 51,955.85 |
| | $6,879,712.24 |

### LIABILITIES

| | |
|---|---|
| Reserve for Losses | $2,567,954.00 |
| Reserve for Unearned Premiums | 1,989,060.47 |
| Reserve for Commissions | 179,422.16 |
| Reserve for Expenses and Taxes Due and Accrued | 160,000.00 |
| The Workmen's Compensation Reinsurance Bureau Loss Reserve | 10,704.54 |
| Contingent Reserve | 300,000.00 |
| Capital Paid Up | 1,000,000.00 |
| Surplus over all Liabilities | 672,571.07 |
| | $6,879,712.24 |

1480 *American Brake Shoe Record.*
*Bond of V. J. Dowling, I. R. T. Receiver.*

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

A. I. MICHELSEN, being duly sworn, says that he is Attorney-in-fact of the American Employers' Insurance Company, and that to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said Company, as of December 31, 1931.

A. I. MICHELSEN,
(Seal) Attorney-in-fact.

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1481 In witness whereof I have hereunto set my hand and affixed my official seal this 29th day of August, 1932.

E. R. PRESCOTT,
Notary Public, New York County.
N. Y. Co. Clks. No. 311, Reg. No. 3 P 432.
Kings Co. Clks. No. 82, Reg. No. 3281.
Bronx Co. Clks. No. 47, Reg. No. 132 P 33.
Queens Co. Clks. No. 1283, Reg. No. 9006.
(Seal) Commission expires March 30, 1933.

---

KNOW ALL MEN BY THESE PRESENTS, that the AMERICAN EMPLOYERS' INSURANCE COMPANY, a corporation duly
1482 organized and existing under the laws of the Commonwealth of Massachusetts, and having its principal office in the City of Boston, Mass., hath made, constituted and appointed, and does by these presents make and constitute and appoint A. I. MICHELSEN of New York and State of New York its true and lawful Attorney-in-fact, with full power and authority hereby conferred in its name, place and stead, to sign, execute and acknowledge for and on its behalf as surety any and all bonds or undertakings required in the State of New York in amounts not exceeding

One hundred thousand dollars ($100,000.) and to bind the American Employers' Insurance Company thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the common seal of the Company, and duly attested by its Secretary, hereby ratifying and confirming all the acts of said Attorney-in-fact pursuant to the power herein given. This Power of Attorney is made and executed pursuant to and by authority of the following resolutions adopted by the Board of Directors of the American Employers' Insurance Company at a meeting duly called and held on the Twenty-ninth day of May, 1923.

"That the President, or, in his absence, any Vice-President, may from time to time appoint Attorneys-in-fact to represent and act for and on behalf of the corporation as respects its surety and fidelity business, and that the President, or, in his absence, any Vice-President may at any time remove any such Attorney-in-fact and revoke all power and authority given to any such Attorney-in-fact.

That all bonds, recognizances, contracts of indemnity, and all other writings obligatory in the nature thereof shall be signed by the President, a Vice-President, or an Attorney-in-fact and shall have the seal of the company affixed thereto, duly attested by the Secretary, an Assistant Secretary, or an Attorney-in-fact.

That Attorneys-in-fact may be given full power and authority to execute for and in the name and on behalf of the corporation any and all bonds, recognizances, contracts of indemnity, and all other writings obligatory in the nature thereof, and any such instrument executed by any such Attorney-in-fact shall be as binding upon the corporation as if signed by the President and sealed and attested by the Secretary, and, further, Attorneys-in-fact are hereby authorized to verify any affidavit required

to be attached to bonds, recognizances, contracts of indemnity, and all other writings obligatory in the nature thereof, and are, also, authorized and empowered to certify to a copy of any of the by-laws of the corporation, as well as any resolutions of the Directors having to do with the execution of bonds, recognizances, contracts of indemnity, and all other writings obligatory in the nature thereof, or with regard to the powers of any of the officers of the corporation or of Attorneys-in-fact."

IN WITNESS WHEREOF, the American Employers' Insurance Company has caused these presents to be signed by its Vice-President and its corporate seal to be hereto affixed, duly attested by its Assistant Secretary, this 18th day of August, A. D. 1930.

AMERICAN EMPLOYERS' INSURANCE COMPANY,
(Signed) By A. B. POOR,
(Seal) Vice-President.

Attest:

(Signed) ROGER G. WHEAR,
Assistant Secretary.

*American Brake Shoe Record.*
*Bond of V. J. Dowling, I. R. T. Receiver.*

COMMONWEALTH OF MASSACHUSETTS, }
COUNTY OF SUFFOLK, } ss.:

On this 18th day of August, A. D. 1930, before me personally came A. B. POOR, to me known, who, being by me duly sworn, did depose and say that he resides in the Town of Winthrop, Mass.; that he is the Vice-President of the American Employers' Insurance Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name hereto by like order.

(Signed) JAMES E. KEARY,
Notary Public.

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COMMONWEALTH OF MASSACHUSETTS, }
COUNTY OF SUFFOLK, } ss.:

I, MARC HUBBERT, Assistant Secretary of the American Employers' Insurance Company, do hereby certify that the above and foregoing is a true and correct copy of an instrument executed by said American Employers' Insurance Company which is still in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Corporation, at the City of Boston, this 29th day of August, 1932.

(Seal)

MARC HUBBERT,
Assistant Secretary.

## Affidavit of Victor J. Dowling.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,

1493 v.

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

VICTOR J. DOWLING, being duly sworn, says:

Prior to my appointment as a temporary Receiver of the Interborough Rapid Transit Company in the above-entitled cause, pursuant to order of Hon. Martin T. Man-
1494 ton, entered August 26, 1932, I had severed my association with the law firm of Chadbourne, Stanchfield & Levy and had no further connection therewith.

Since the date of the severance of my association I have not rendered any services for said firm nor had any relations therewith; and I have no claim to or interest in said firm, actual or contingent, present or prospective, all claims respecting services rendered prior to my severance having heretofore been completely settled.

*American Brake Shoe Record.*
*Affidavit of Victor J. Dowling.*

I was a director in the Equitable Life Assurance Society. When I ascertained upon my return to this country that it was interested in the securities of the Manhattan Elevated Railway Company, I at once resigned my directorship therein.

VICTOR J. DOWLING.

Subscribed and sworn to before me
this 23rd day of September, 1932.

JOHN R. HALPIN,
Notary Public,
Kings County.
Clerk's No. 707, Reg. No. 3420.
N. Y. Co. Clks. No. 1251, Reg. No. 3H804.
Commission expires March 30, 1933.

(Seal)

Doc. 58

## Affidavit of Publication of Notice to Creditors of Manhattan Railway Company.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.:
BOROUGH OF MANHATTAN,

THOMAS J. NESTOR, being duly sworn, says that he is the Principal Clerk of the Publisher of the "New York Evening Post," a daily newspaper printed and published in the City and County of New York, Borough of Manhattan; that the advertisement hereto annexed has been regularly published in the said "New York Evening Post" on the 13th day of September, 1932.

THOMAS J. NESTOR.

Sworn to before me this
14th day of September, 1932.

GEORGE TOBIN,
Notary Public,
Kings County.
Co. Clerk's No. 72, Reg. No. 4073.
Certificate filed in N. Y. County.
Co. Clk's No. 140, Reg. No. 4T88.
Commission expires March 30, 1934.

(Notarial Seal)

*American Brake Shoe Record.*
*Affidavit of Publication of Notice to Creditors.*

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

IN THE MATTER
OF
The Petition of MANHATTAN RAILWAY COMPANY.

In Equity
E 70 364

*To the Creditors of Manhattan Railway Company:*

PLEASE TAKE NOTICE that a hearing will be held on September 22, 1932, at room 439, in the Old Post Office Building, Borough of Manhattan, City of New York, at 10.30 o'clock in the forenoon, why the receivership of Manhattan Railway Company should not be continued during the pendency of the above-entitled suit, and that upon the hearing of said order to show cause any creditor of Manhattan Railway Company or other party in interest may be heard.

Dated, New York, September 13, 1932.

WILLIAM ROBERTS,
Receiver of Manhattan Railway Company.

HUGHES, SCHURMAN & DWIGHT,
Solicitors for the Receiver of Manhattan
Railway Company.

Doc. 59

## Notice of Motion by Protective Committee for 7% Stock of Manhattan Company in Re Receivers' Application No. 9.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Plaintiff,
against
1505 INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

In Equity
E 70-364

*Sirs:*

On you and each of you we hereby serve a copy of the motion and of the proposed order thereon filed by us on yesterday, September 26th, in behalf of Harold Palmer and others as the Protective Committee for the holders of Manhattan Railway Company Guaranteed Seven Per Cent. Stock at the hearing at which you were present before his Honor, The Honorable Martin T. Manton, Circuit Judge, in his Chambers, upon the Petition of the Temporary Receivers for Interborough Rapid Transit
1506 Company on their application number 9 relating to certain obligations of said Company maturing October 1, 1932, on which said motion and on other matters referred to in said application, the Court will hear the interested parties on October 3, 1932, at 3 P. M.

Dated, New York, N. Y., September 29, 1932.

Yours, etc.,

MARSHALL & WEHLE,
Solicitors for Intervenors,
Harold Palmer and others,
No. 50 Broadway,
New York, N. Y.

To:

MESSRS. CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Victor J. Dowling and Thomas E. Murray, Jr., Temporary Receivers of Interborough Rapid Transit Company,
25 Broadway, New York, N. Y.

MESSRS. HUGHES, SCHURMAN & DWIGHT,
Solicitors for William Roberts, Temporary Receiver of Manhattan Railway Company,
100 Broadway, New York, N. Y.

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Doc. 59a

**Motion of Harold Palmer and Others as Protective Committee for Manhattan Railway Company Seven Per Cent. Guaranteed Stock Relating to Proposed Instructions to Receivers on Their Application No. 9.**

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

Come now Harold Palmer and others as the Protective Committee for holders of Manhattan Railway Company Seven Per Cent. Guaranteed Stock, intervenors herein by

1510 *American Brake Shoe Record.*
*Notice of Motion by Palmer & Ors. Committee.*

order of this Court dated September 28, 1932, and in the ex parte hearing on Receivers' Application No. 9, of which they have received informal notice, now move the Court for an order directing the Receivers of Interborough Rapid Transit Company on October 1st to pay out of funds on hand the aggregate sum of $76,142.50 to apply upon the guaranteed dividend rental of $1.75 per share upon the 43,510 outstanding shares of Manhattan Railway Company stock which did not participate in the readjustment plan of May 1, 1922, such payment to be made by them directly to such stockholders of Manhattan Railway Com-
1511 pany as furnished to the Receivers by said Company and to be wholly without prejudice as to the binding nature of the indenture of lease of January 1, 1903, between Manhattan Railway Company and Interborough Rapid Transit Company upon said Receivers, or as to such rights as they may have, if any, to disaffirm or reject such lease.

Dated, New York, N. Y., September 26, 1932.

MARSHALL & WEHLE,
Solicitors for Petitioners.

1512

Doc. 59b

**Proposed Order as to 7% Stock of Manhattan Company, in Relation to Receivers' Application No. 9.**

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70 364 |

This cause coming on to be heard upon Application No. 9 of the Receivers of Interborough Rapid Transit Company and upon the motion of Harold Palmer and others as the Protective Committee for the Manhattan Railway Company "Seven Per Cent. Guaranteed Stock," being the stock of said Company which did not assent to the readjustment plan of May 1, 1922, and the Court being duly advised, it is

ORDERED that Victor J. Dowling and Thomas E. Murray, Jr., as Receivers for Interborough Rapid Transit Company, be and they are hereby directed on October 1, 1932, to pay out of funds on hand the aggregate sum of $76,142.50 to apply upon the guaranteed dividend rental of $1.75 per share upon the 43,510 outstanding shares of Manhattan Railway Company stock which did not par-

ticipate in the readjustment plan of May 1, 1922, such payment to be made by them directly to such stockholders of Manhatan Railway Company as furnished to the Receivers by said Company and to be wholly without prejudice as to the binding nature of the indenture of lease of January 1, 1903, between Manhattan Railway Company and Interborough Rapid Transit Company upon said Receivers, or as to such rights as they may have, if any, to disaffirm or reject such lease.

*Justice of the United States District Court*
*for the Southern District of N. Y.*

Doc. 60

## Answer of Interborough Receivers to Petition of William Roberts, Receiver of Manhattan.

IN THE

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | IN EQUITY E 70-364 |

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers of Interborough Rapid Transit Company (hereinafter called "Interborough"), as and for their answer to the petition of William Roberts, Receiver of Manhattan Railway Company (hereinafter called "Manhattan"), state:

I. They are without knowledge as to each and every allegation set forth in paragraph IV of the petition, except they admit that the bill of complaint herein alleges "that the defendant has neglected and failed to pay certain taxes for 1932 duly assessed by the City of New York against the special franchises and real estate belonging to the Manhattan, the amount of such unpaid taxes now due thereon being in excess of $860,000," and that the answer of the defendant herein admits such allegation and that these Receivers have not paid said taxes.

1522

II. They allege that they are without knowledge as to each and every allegation set forth in paragraph VI of the petition, except they admit that the Interborough and the City of New York have made large investments by virtue of the contracts between the City of New York and the Interborough and certain Certificates duly granted by the City of New York acting by the Public Service Commission, and except they deny, upon information and belief, that the Manhattan has made any investments in the combined system of elevated and subway lines other than the properties covered by the lease by it to the Interborough.

1523

III. They allege that they are without knowledge as to each and every allegation set forth in paragraph VII of the petition, except they deny that they have all the moneys that have arisen from the operation of the Manhattan, and except they admit that the properties of the Manhattan which are subject to the lease described in the petition are in the possession of these Receivers.

IV. They deny each and every allegation set forth in paragraph VIII of the petition, except they allege that they are without knowledge as to the amount to which the Manhattan is justly and reasonably entitled as proper compensation for the use of its properties, and they admit

1524

that the Receivers have funds in excess of the amount of said taxes and bond interest, but they allege that they are without knowledge at this time, and cannot obtain such knowledge without the investigation hereinafter referred to, as to whether any of said funds should, or having due regard to the rights or priorities of other creditors, may be used for making payments of said taxes or bond interest.

V. They deny each and every allegation set forth in paragraph IX of the petition, except they admit that under Contract 3 the Interborough has for many years received,

and it is expected by the Accounting Department of the Receivers that there will continue to be received, a net profit amounting to not less than $3,170,000 per year over and above all expenses of operation, including interest and sinking fund charges on Interborough obligations issued for the construction or equipment of the subways, and further, that the gross operating revenue from the Manhattan Division is approximately equal to the operating expenses and taxes of such division, and except they allege that the income of these Receivers is derived principally from the operation of the subway division.

VI. They deny each and every allegation set forth in paragraph X of the petition, except they admit that the Interborough's income statement of the Manhattan Division operations for the twelve months ending June 30, 1932, shows a "net operating revenue" of $3,066,918.55 from the Manhattan Division as distinguished from the Manhattan mortgaged lines, before deducting taxes or current rent deductions, and they allege that after deducting taxes, which amounted to $1,931,736.31, and current deductions amounting to $2,364,970.92, for the twelve months ending June 30, 1932, the deficit in the operations of the Manhattan Division amounted to *$1,229,788.68* without deducting the interest and sinking fund requirements amounting to $3,205,310.35 for the year ending June 30, 1932, for the $31,132,537 of First Mortgage Five Per Cent. Bonds, $14,650,537 of Ten Year Seven Per Cent. Notes, and $1,877,552 of Ten Year Unsecured Six Per Cent. Notes, the proceeds of which were used to pay the costs of the additional tracks upon the Manhattan railroads, the cost of improving the power plant of the Manhattan, and the cost of the railroads constructed under the Interborough Certificate of March 19, 1913.

They admit that the sum of $3,066,918.80, together with the balance of income from the subway division, amounting to $3,586,640.97, exceeds $6,000,000, but they allege that

1528 sum was less, by $831,749.17, than the total cost of operations of the combined subway and elevated systems for the year 1932. Said last-mentioned figure does not take into consideration the so-called dividend rentals of 5% on the Manhattan modified guaranteed stock which is payable only if earned and which would amount to $2,782,450.

| | |
|---|---|
| The net preferential for the year ending June 30, 1932, was | $ 3,178,100.00 |
| This was used to pay interest and sinking fund on $47,660,626 of I. R. T. 5% bonds, 7% notes and 6% notes issued to pay the cost of third tracks, power plant improvements of Manhattan Division and the lines of the Interborough constructed pursuant to the Interborough Certificate because the elevated lines earned nothing to apply on this fixed charge | $ 3,205,310.35 |
| Deficit after use of subway net preferential | *$ 27,210.35* |
| The elevated deficit was | *$ 1,229,788.68* |
| Applying all other available system income amounting to | 398,039.51 |
| Left a system deficit of | *$ 831,749.17* |

1529

1530 VII. They allege they are without knowledge as to each and every allegation set forth in paragraph XI of the petition, except they allege that the Interborough has at the present time outstanding obligations in excess of $47,000,000 on account of third tracks and power plant improvements made upon the Manhattan mortgaged properties and upon the railroad lines of Interborough made pursuant to Interborough Certificate of 1913, and they deny, upon information and belief, that the investment by the Interborough in the third tracks and power plant im-

provements upon the Manhattan properties will be lost by the Interborough or its Receivers, and for the fiscal years ending June, 1929, and June, 1930, the Interborough paid in addition to the items set forth in said paragraph XV an additional amount as rental upon the Manhattan modified guaranteed stock, and they allege that only after an investigation in the manner hereinafter described in this answer can the value of the property owned by Manhattan or subject to the lien of its first mortgage be determined.

VIII. Answering paragraph XV of the petition, they allege that in addition to the rentals therein described the Interborough has paid the full 5% dividend rental upon the Manhattan modified guaranteed stock for the year ending June 30, 1928.

IX. They are without knowledge at this time as to each and every allegation set forth in paragraph XVI of the petition and cannot obtain said knowledge without an investigation for that purpose as hereinafter set forth.

X. They allege that at the present time they are without knowledge as to each and every allegation set forth in paragraph XVII of the petition, and cannot obtain that knowledge without an investigation for that purpose as hereinafter set forth.

FURTHER ANSWERING THE PETITION, THESE RESPONDENTS SHOW:

XI. On September 28, 1932, these Receivers duly petitioned this Court for an order:

> "that they may receive the instructions of the Court with respect to the payment of the amounts which have heretofore become due and payable and which will on October 1, 1932, and thereafter, become

1534

payable by way of rental under the lease from Manhattan; that in view of the interest of Guaranty Trust Company of New York, as Trustee under the First & Refunding Mortgage of Interborough, dated March 28, 1913, as above set forth, said Trustee be brought in as a party to this cause; that all the parties to this cause, including the intervenors and said Guaranty Trust Company of New York, as Trustee as aforesaid, be directed to answer the foregoing petition on such date as the Court may fix, and that the foregoing matters be set down for hearing thereafter; that this Court order and direct

1535

that pending hearing and final adjudication of this Court on the matters set forth in this petition, no acts or action of the petitioners shall be deemed to constitute either an adoption or rejection of said lease or of any of the agreements hereinbefore set forth; and that the Court grant such other and further relief in the premises as to it may seem necessary and proper."

Said petition is duly filed in this Court and is made a part hereof with the same force and effect as if herein set forth at length. Said petition, by an order of this Court dated September 28, 1932, will be brought on for hearing on October 3, 1932, at three o'clock P. M., in room 439,

1536

United States Post Office Building, Borough of Manhattan, City of New York, and said order is made a part hereof as if herein fully set forth at length, and said order has been duly filed in this Court, and the aforesaid petition and the order have been duly served on all parties to this cause.

FURTHER ANSWERING THE PETITION, YOUR RESPONDENTS SHOW:

XII. The claim for the payment of taxes of the Manhattan and the interest on the Consolidated Mortgage

Bonds are claims by a general creditor or creditors of the Interborough, and the payment of such claims must depend upon (1) the free moneys in the hands of your Receivers and (2) the priority of the claims of other creditors, general or secured.

For that purpose, and because of the matters hereinafter set forth, which will show the complicated questions of fact and accounting, as well as law, involved, your Receivers suggest to this Court that a Special Master be appointed to hear and determine the questions presented by the petition and this answer.

XIII. As evidencing the complicated and involved financial condition of the affairs of the Interborough, your Receivers give the following statement of the moneys of the Interborough now on hand and the claims against those moneys and the depletion thereof by the operation of the Manhattan division for the three months' period ending December 31, 1932, to wit:

The cash on hand in the custody of your Receivers totaled $8,289,951.84 on the morning of September 30, 1932. All of that sum is not available for the corporate purposes of the Interborough, as the following analysis will show:

As of said date the amount held in the so-called "corporate cash account" of the Receivers on hand was $1,383,345.79.

For the purposes of operating the Manhattan Division there was cash on hand in the sum of $543,420.79, making a total of $1,926,766.58.

From that last figure there must be deducted, for the vouchers in transit because of your Receivers' operation of the Manhattan Division, $49,300, leaving a sum of $1,877,466.58.

At the present time there is pending before the Court the question of the Interborough State franchise tax on

the operations of the Manhattan Division. The amount involved is $81,136.60, which, subtracted from the previous total, leaves $1,796,329.98.

On September 30, 1932, the balance of the moneys was not available, because it consisted of the following items:

(1) $5,317,468.51 held in a separate account for the purpose of operating the subway division of the Interborough. [Of this sum, $2,200,000 was payable to these Receivers and was paid to these Receivers on October 1, 1932, as hereinafter set forth.]

(2) $233,424.26, representing capital moneys which these Receivers believe are subject to the lien of the Interborough Mortgage and cannot be used for the ordinary corporate purposes.

(3) $216,833.90, representing moneys on account of the Manhattan Construction Account and which, under the Manhattan lease, must be devoted to the purpose of improving the Manhattan Elevated property.

(4) $393,443.55, a special deposit because of a lien by the City of New York under agreement of August 30, 1929, pending determination as to disputed items under the Subway Contracts.

(5) $33,428.22, a fund in trust to cover the death or disability of the employees of the Interborough, which is a payment made to those employees in the form of an insurance, to which the employees have contributed and which is in addition to the insurance afforded by the Workmen's Compensation Act.

(6) $168,586.82, representing deposits on account of coupons and dividends, which coupons and dividends are long overdue and for which the holders thereof or the persons entitled thereto have not presented their claims.

On October 1, 1932, there was deducted from the item of $5,317,468.51, pursuant to the Interborough's Contract No. 3 with the City of New York, the sum of approximately $2,200,000, and transferred to the so-called "Corporate Cash Account."

There was then available on October 1, 1932, less any deductions that were made as a result of expenditures on September 30, 1932, in the operation of the Manhattan Division, the sum of $3,996,329.98.

That figure of $3,996,329.98 comprises the sum of $1,796,-329.98, representing the cash on hand available to the Receivers for general purposes, plus the sum of $2,200,000 which the Interborough, under Contract No. 3, had the right to draw down on September 30, 1932, from the cash on hand from the Subway Division operations.

Against the available cash on October 1, 1932, there are, among others, the following claims:

(1) The lien of the City of New York against the Interborough in the sum of $510,000, for taxes and interest against Interborough property in arrears for part of the year 1928 and all of the year 1929.

(2) The material and supply bills due for a period of four months prior to the time that these Receivers were appointed, on account of material and supplies provided to the Manhattan Division, totaling approximately $594,600.

(3) Subway capital advances of approximately $200,000.

(4) The real estate and special franchise taxes of the Manhattan in the sum of $860,000, which taxes are the subject of the petition presented by the Receiver of the Manhattan.

(5) The principal and interest on the Seven Per Cent. Notes of Interborough which were due on September 1, 1932, amounting to $32,780,623.

546 *American Brake Shoe Record.*
*Answer of I. R. T. Rec. to Manhattan Rec. Pet.*

(6) The principal and interest on the Six Per Cent. Notes of Interborough due October 1, 1932, amounting to $10,815,000.

(7) The interest on the Four Per Cent. Consolidated Mortgage Bonds of Manhattan Railroad, plus the $25,000 administration expense, plus one-quarter of the dividends on the 43,510 shares of the Seven Per Cent. Stock of the Manhattan which did not assent to the plan of readjustment, totaling $914,802.

547 Thus, there are, against the $3,996,329.98 available, claims approximating $46,700,025.

XIV. Your Receivers are advised by their Accounting Department that the operations of the Manhattan Division for the three months' period ending December 31, 1932, or any extended period thereafter, will fail to cover the cost of operations and taxes, without providing any sum to Manhattan or the holders of its securities.

XV. Your Receivers suggest to the Court that an investigation of all the facts, under the guidance of a Special Master, will aid this Court and your Receivers in arriving at a conclusion that will be fair and equitable to all parties concerned, to the end that no one party should obtain a
548 preference to which he or it is not entitled, at the expense of some other party to this cause or to some other interest not at present in the cause.

FURTHER ANSWERING THE PETITION, YOUR RESPONDENTS SHOW:

XVI. The properties of the Manhattan covered by its Consolidated Mortgage (hereinafter called the "Manhattan mortgaged properties") are not identical with and do not cover the whole of the Manhattan Division of the Interborough. The figures set forth above in paragraph XIII

hereof account for the results of all the operations over the railroad owned by the Manhattan and the third and additional tracks constructed by the Interborough under the Manhattan Certificate, the power plant of the Manhattan as improved by the Interborough, the operation over the three lines owned by Interborough constructed under the Interborough Certificate of 1913 and known as the Webster Avenue Line, the Eighth Avenue and 162nd Street Connection, and the Queensboro Bridge Line, and the operation of the Manhattan Division trains over the portions of the Subway lines over which trackage rights were granted by the Joint Trackage Agreement of March, 1913, which lines are located on Jerome Avenue north of 162nd Street, White Plains Road north of Gunhill Road, and in the Borough of Queens east of the Queensboro Bridge, Plaza Station.

These Receivers have been advised, and verily believe, that the determination of the actual income and cost of the operation of the lines belonging to the Manhattan Company and covered by its mortgage, as culled from the income and cost of operation of the Manhattan Division, will be a most difficult and complicated task by reason of the following circumstances:

If it be assumed that such a division could be made upon the basis of cost per mile for the entire Manhattan Division—with the various types of cars in use and different character of service on the different portions of the lines, i. e., express service or local service, and in some instances a combination of both—it is impossible to make any division of those operating expenses without a most extensive study of all the conditions and circumstances surrounding such operation; to do that it would be necessary to determine the fares collected on each one of the stations of the Manhattan lines and the fares collected at the stations on the railroads built and owned by the Interborough under the Interborough Certificate. The revenue credited to the Manhattan Division in connec-

tion with the joint operation over portions of the subway lines is derived in part by use of property owned by Interborough and is determined under the provisions of the Joint Trackage Agreement.

Your Receivers have been advised that a division of the total passenger revenue of the Manhattan Division cannot be made to the Manhattan lines covered by the Manhattan mortgage and to the Interborough lines operated in connection therewith, merely upon a determination of the amount collected on such respective lines, but such division must take into consideration the point at which such
1553 passengers board trains, whether their journey is confined to the lines covered by the Manhattan mortgage and the railroads owned by the Interborough, or to the jointly operated lines, or whether it is intended to include trips over more of those lines, and what part of such lines is used for such trips.

The determination of those questions will require numerous checks upon travel and an extended study of statistics and figures that can be made only by competent engineers under the guidance of a Special Master.

XVII. Your Receivers are further advised and verily believe that the difficulties of any apportionment become apparent when consideration is given to the fact that the passenger business on the Manhattan Division for the
1554 fiscal year ending June 30, 1932, was approximately 293,000,000 passengers, with respect to which the only information available is the point of origination of the business, and in the case of the lines operated under the joint traffic arrangement even that information is not fully available.

Your Receivers are further advised and verily believe that similar difficulties arise in connection with the division of other operating revenue, amongst which may be included the sale of power and advertising and vending privileges as between the Manhattan lines and such lines

of the Interborough operated in connection therewith; the total amount of that revenue aggregates approximately $1,500,000 per year, and any equitable division thereof requires extended study and consideration.

With respect to all the matters involved, your Receivers are advised by their counsel that they will entail the application of many difficult questions of law, as well as the application of many questions of engineering and accounting, all of which can best be determined by a Special Master who can devote the necessary time required for the consideration of the many issues involved.

XVIII. Your Receivers allege that by virtue of the foregoing facts an exceptional case has been made out that would justify and warrant this Court in appointing a Special Master for the determination of the issue or issues raised by the petition and this answer thereto.

WHEREFORE your Receivers pray that this Court appoint a Special Master to determine the issue or issues raised by said petition and this answer thereto, and grant such other and further relief in the premises as to it may seem meet and just.

VICTOR J. DOWLING,
THOMAS E. MURRAY, JR.,
Receivers for Interborough Rapid Transit Company.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Receivers.

WILLIAM WALLACE,
of Counsel.

## Supplemental Petition of Receivers to Receivers' Application No. 9 for Instructions Respecting October 1, 1932, Payment Under Manhattan Lease.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70 364 |

1559

*To the Honorable Judges of the District Court of the United States for the Southern District of New York:*

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., Receivers of Interborough Rapid Transit Company (hereinafter referred to as "Interborough"), as and for their supplemental petition to a petition verified September 28, 1932, otherwise known as Receivers' Application No. 9, state:

1560

1. Heretofore and on or about September 28, 1932, William Roberts as Receiver of Manhattan Railway Company (hereinafter referred to as "Manhattan") petitioned this Court for an order directing these Receivers to pay to said Roberts as Receiver of Manhattan certain taxes that had been theretofore assessed against the property of Manhattan, and interest on the Consolidated Mortgage Bonds of Manhattan.

2. The claim for the payment of taxes of the Manhattan and the interest on the Consolidated Mortgage Bonds are claims by a general creditor or creditors of the Interborough, and the payment of such claims must depend upon (1) the free moneys in the hands of your Receivers and (2) the priority of the claims of other creditors, general or secured.

For that purpose, and because of the matters hereinafter set forth, which will show the complicated questions of fact and accounting, as well as law, involved, your Receivers suggest to this Court that a Special Master be appointed to hear and determine the questions presented by Receivers' Application No. 9 and this petition supplemental thereto.

3. As evidencing the complicated and involved financial condition of the affairs of the Interborough, your Receivers give the following statement of the moneys held by these Receivers as of September 30, 1932, and estimate of claims and indebtedness payable by Interborough (excluding claims in action), to wit:

The cash on hand in the custody of your Receivers totaled $8,289,951.84 on the morning of September 30, 1932. All of that sum is not available for the general purposes of the Receivers, as the following analysis will show:

As of said date the amount held in the so-called "corporate cash account" of the Receivers was $1,383,345.79.

For the purposes of operating the Manhattan Division there was cash on hand in the sum of $543,420.79, making a total of $1,926,766.58.

From that last figure there must be deducted, for the vouchers in transit, $49,300, leaving a sum of $1,877,466.58.

1564 *American Brake Shoe Record.*
*Supplemental Petition to Application No. 9.*

On September 30, 1932, the balance of the moneys was not available, because it consisted of the following items:

(1) $5,317,468.51 held in a separate account for the purpose of operating the Subway Division of the Interborough. [Of this sum, $2,200,000 was payable to these Receivers and was paid to these Receivers on October 1, 1932, as hereinafter set forth.]

(2) $233,424.26, representing capital moneys which these Receivers believe are subject to the lien of the Interborough Mortgage and cannot be used
1565 except for capital expenditures as therein provided.

(NOTE—In addition Interborough invested $700,000 of similar funds in $500,000 principal amount of New York City bonds, and in a $200,000 first mortgage on real estate which had theretofore been taken by Interborough on a sale of real estate owned by it.)

(3) $216,833.90, representing moneys in the Manhattan Construction Account and which, under the Manhattan lease, must be devoted to the purpose of improving the Manhattan Elevated property.

(4) $393,443.55, a special deposit because of a lien by the City of New York under agreement of August 30, 1929, pending determination as to disputed items under the Subway Contracts.

(5) $33,428.22, a fund in trust to cover the death
1566 or disability of the employees of the Interborough, which is a payment made to those employees in the form of an insurance, to which the employees have contributed and which is in addition to the insurance afforded by the Workmen's Compensation Act.

(6) $168,586.82, representing deposits on account of coupons and dividends, which coupons and dividends are long overdue and for which the holders thereof or the persons entitled thereto have not presented their claims.

*American Brake Shoe Record.*
*Supplemental Petition to Application No. 9.*

On October 1, 1932, there was deducted from the foregoing item of $5,317,468.51, pursuant to the Interborough's Contract No. 3 with the City of New York, the sum of approximately $2,200,000, and transferred to the so-called "Corporate Cash Account."

There was then available on October 1, 1932, less any deductions made as a result of expenditures on September 30, 1932, in the operation of the Manhattan Division, the sum of $1,077,466.58.

That figure of $1,077,466.58 comprises the sum of $1,877,466.58, representing the cash on hand available to the Receivers for general purposes, plus the sum of $2,200,000 which the Interborough, under Contract No. 3, had the right to draw down on September 30, 1932, from the cash on hand from the Subway Division operations.

Against the available cash on October 1, 1932, there are, among others, the following claims:

(1) The lien of the City of New York against the Interborough in the sum of $510,000, for taxes and interest against Interborough property in arrears for part of the year 1928 and all of the year 1929.

(2) The material and supply bills due for a period of four months prior to the time that these Receivers were appointed, on account of material and supplies provided to the Manhattan Division, totaling approximately $594,600.

(3) Subway capital advances of approximately $200,000 to December 31, 1932.

(4) The real estate and special franchise taxes of the Manhattan in the sum of $860,000, which taxes are the subject of the petition presented by the Receiver of the Manhattan.

(5) The principal and interest on the Seven Per Cent. Notes of Interborough which were due on September 1, 1932, amounting to $32,780,623.

(6) The principal and interest on the Six Per Cent. Notes of Interborough due October 1, 1932, amounting to $10,815,000.

(7) The interest on the Four Per Cent. Consolidated Mortgage Bonds of Manhattan Railroad, plus the $25,000 administration expense, plus one-quarter of the dividends on the 43,510 shares of the Seven Per Cent. Stock of the Manhattan which did not assent to the plan of readjustment, totaling $914,802.

(8) Interborough State franchise tax on operations of Manhattan Division, $81,136.60.

The foregoing claims aggregate approximately $46,800,000, but do not include claims now in action. All of such claims are subject to investigation and audit. The cash available as of September 30, 1932, to satisfy all of such claims was approximately $4,077,466.58.

4. Your Receivers are advised by their Accounting Department that the operations of the Manhattan Division for the three months' period ending December 31, 1932, or any extended period thereafter, will fail to cover the cost of operations and taxes, without providing any sum to Manhattan or the holders of its securities.

5. Your Receivers suggest to the Court that an investigation of all the facts, under the guidance of a Special Master, will aid this Court and your Receivers in arriving at a conclusion that will be fair and equitable to all parties concerned, to the end that no one party should obtain a preference to which he or it is not entitled, at the expense of some other party to this cause or to some other interest not at present in the case.

6. The properties of the Manhattan covered by its Consolidated Mortgage (hereinafter called the "Manhattan mortgaged properties") are not identical with and do not cover the whole of the Manhattan Division of the Interborough. The statements of operating results of the Manhattan Division set forth in the petition of these Receivers verified September 28, 1932, and in this supplemental petition, account for the results of operations over the railroad owned by the Manhattan and the third and additional tracks constructed by the Interborough under the Manhattan Certificate, the power plant of the Manhattan as improved by the Interborough, the operation over the three lines owned by Interborough constructed under the Interborough Certificate of 1913 and known as the Webster Avenue Line, the Eighth Avenue and 162nd Street Connection, and the Queensboro Bridge Line, and the operation of the Manhattan Division trains over the portions of the Subway lines over which trackage rights were granted by the Joint Trackage Agreement of March, 1913, which lines are located on Jerome Avenue north of 162nd Street, White Plains Road north of Gunhill Road, and in the Borough of Queens east of the Queensboro Bridge, Plaza Station.

These Receivers have been advised, and verily believe, that the determination of the actual income and cost of the operation of the lines belonging to the Manhattan Company and covered by its mortgage, as culled from the income and cost of operation of the Manhattan Division, will be a most difficult and complicated task by reason of the following circumstances:

If it be assumed that such a division could be made upon the basis of cost per mile for the entire Manhattan Division—with the various types of cars in use and different character of service on the different portions of the lines, i. e., express service or local service, and in some instances a combination of both—it is impossible to make any division of those operating expenses without

a most extensive study of all the conditions and circumstances surrounding such operation; to do that it would be necessary to determine the fares collected on each one of the stations of the Manhattan lines and the fares collected at the stations on the railroads built and owned by the Interborough under the Interborough Certificate. The revenue credited to the Manhattan Division in connection with the joint operation over portions of the subway lines is derived in part by use of property owned by Interborough and is determined under the provisions of the Joint Trackage Agreement.

577 Your Receivers have been advised that a division of the total passenger revenue of the Manhattan Division cannot be made to the Manhattan lines covered by the Manhattan mortgage and to the Interborough lines operated in connection therewith, merely upon a determination of the amount collected on such respective lines, but such division must take into consideration the point at which such passengers board trains, whether their journey is confined to the lines covered by the Manhattan mortgage and the railroads owned by the Interborough, or to the jointly operated lines, or whether it is intended to include trips over more of those lines, and what part of such lines is used for such trips.

The determination of those questions will require numerous checks upon travel and an extended study of statistics
578 and figures that can be made only by competent engineers under the guidance of a Special Master.

7. Your Receivers are further advised and verily believe that the difficulties of any apportionment become apparent when consideration is given to the fact that the passenger business on the Manhattan Division for the fiscal year ending June 30, 1932, was approximately 293,000,000 passengers, with respect to which the only information available is the point of origination of the business, and in the case of the lines operated under the joint traffic arrangement even that information is not fully available.

Your Receivers are further advised and verily believe that similar difficulties arise in connection with the division of other operating revenue, amongst which may be included the sale of power and advertising and vending privileges as between the Manhattan lines and such lines of the Interborough operated in connection therewith; the total amount of that revenue aggregates approximately $1,500,000 per year, and any equitable division thereof requires extended study and consideration.

8. With respect to all the matters involved in Receivers' Application No. 9, to which this petition is supplemental, as well as all the matters herein involved, your Receivers are advised by their counsel that they will entail the application of many difficult questions of law, as well as the application of many questions of engineering and accounting, all of which can best be determined by a Special Master who can devote the necessary time required for the consideration of the many issues involved.

9. Your Receivers allege that by virtue of the foregoing facts and the facts alleged in the said petition of these Receivers verified September 28, 1932, an exceptional case has been made out that would justify and warrant this Court in appointing a Special Master for the determination of the issues raised by said petition verified September 28, 1932, to which this petition is supplemental, and by this petition.

WHEREFORE, your petitioners respectfully pray to the Court that they may receive the instructions of the Court with respect to the payment of the amounts which have heretofore become due and payable, and which did on October 1, 1932, and thereafter, become payable by way of rental under the lease of Manhattan, and whether the operations of the Manhattan lines under the lease are such as to justify the payment of the stipulated rentals under said lease, and to that end that a Special Master

582 *American Brake Shoe Record.*
*Supplemental Petition to Application No. 9.*

be appointed to determine the issues raised by Receivers' Application No. 9 and the answers thereto, and this supplemental petition, and such further answers to said petition and this supplemental petition as the respective parties appearing in this cause may desire to present to such Special Master; and that the prayer for relief in Receivers' Application No. 9 be granted in full; and that the Court grant such other and further relief in the premises as to it may seem meet and just.

VICTOR J. DOWLING,
THOMAS E. MURRAY, Jr.,
583 Receivers for Interborough Rapid Transit Company.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for Receivers.

WILLIAM WALLACE,
of Counsel.

584

Doc. 62

## Affidavit of H. M. Fisher, Treasurer for Receivers, as to Cash—Submitted in Hearing on Receivers' Application No. 9.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 |

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

H. M. FISHER, being duly sworn, deposes and says:

That on August 26, 1932, he was appointed Treasurer for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, and has since acted as such; that he is familiar with the cash accounts of said Receivers; that prior to the appointment of said Receivers he was Treasurer for Interborough Rapid Transit Company for many years, and that he has had charge of its cash and securities and is fully familiar with the accounts respecting the same.

That he caused to be prepared and attached to this affidavit as Schedule A an analysis of the moneys in the hands of said Receivers. That the purpose of this Schedule is to explain the averments in that regard appearing in the Supplemental Petition of the Receivers verified October 6, 1932. That said Schedule A consists of three sheets, and the figures on Sheet 1 of said Schedule are tied into the Supplemental Petition of the Receivers above mentioned.

1588 *American Brake Shoe Record.*
*Affidavit of H. M. Fisher.*

*Sheet 1*

This sheet is meant to explain the nature of the cash in the hands of the Receivers on the morning of September 30, 1932.

It begins with a total of $8,289,951.84. It then explains more specifically than in said Supplemental Petition the five special accounts, the moneys in which are included in the above total sum, which five items are available only for the special purposes for which each account was created. These five items total $1,045,716.75. After setting them apart, the moneys remaining are $7,244,235.09.

1589 Then follows an explanation of cash in the subway operating account, in which on September 30, 1932, there was $5,317,468.51, which moneys could not be used for any purpose save as provided in the contract, pursuant to which said account was originated and maintained. From this account the Receivers withdrew on October 1, 1932, as part of the net preferential due from the subway, in accordance with the terms controlling said account, $2,200,000. After setting apart the balance in this subway account (above the amount of this withdrawal), which balance amounts to $3,117,468.51, there remained of the $7,244,235.09 above referred to, $4,126,766.58. From this sum there had to be deducted $49,300 of unpaid voucher obligations then in transit, leaving a balance of $4,077,466.58, which is the so-called general available cash

1590 referred to on page 397 of said Supplemental Petition.

On September 30, 1932, this amount was held in two accounts as follows: (1) a general purpose account amounting to $1,383,345.79, which is increased as of October 1, 1932, by $2,200,000, being the amount transferred from the subway operation account above referred to, making a total of $3,583,345.79; and (2) an account available for operating the Manhattan Division, $543,420.79, less unpaid vouchers of $49,300, or a net of $494,120.79. This sum of $494,120.79 includes the $357,305.12 in the account for the Manhattan Division operations on August 26, 1932, the date of appointment of the Interborough Receivers.

*American Brake Shoe Record*
*Affidavit of H. M. Fisher.*

*Sheet 2*

This shows the expected cash available for the period August 26, 1932, to December 31, 1932.

The first item consists of the amount in the general account, being the amount referred to on Sheet 1, i. e., $3,583,315.79. Next follows the net amount in the account for the Manhattan Division on September 30, 1932, $494,120.79. Next follows the amount of the estimated earnings of the Manhattan Division from September 30, 1932, to December 31, 1932, $412,500. This figure is arrived at by deducting from the estimate of cash results of operation of Manhattan Division for period August 26, 1932, to December 31, 1932, which is shown on Sheet 3, the portion of the net revenues for the period August 26, 1932, to September 30, 1932. Next follows an item of $1,375,000, being the remainder of the September 30, 1932, preferential under subway contracts which is estimated will be available from current operations prior to December 31, 1932. The next item is the entire December 31, 1932, preferential under the subway contracts, which is estimated will be available on December 31, 1932, approximately $3,575,000.

The foregoing five items aggregate $9,439,966.58.

Against this cash, the claims and indebtedness of the Interborough Company matured or maturing on or prior to January 1, 1933, without including claims for personal injuries or other litigated claims, and including cash capital requirements under subway contracts, are set forth.

The first item consists of real estate taxes of the Interborough for 1928 and 1929 in arrears, amounting to $510,000.

The second item is that of past due supply bills payable on account of Manhattan Division operations, amounting to approximately $594,600.

The third item is that of capital expenditures on the subway under contract with the City to December 31, 1932, amounting to $200,000. Capital expenditures are

constantly required to be made for improvements, etc., and it is necessary to make provision therefor.

The fourth item represents the interest and principal on the 7% Secured Gold Notes of the Interborough Company due September 1, 1932, which, after including interest to January 1, 1933, amounts to $33,519,300.

The fifth item represents the interest and principal on the 6% Notes of the Interborough Company due October 1, 1932, which, after including interest to January 1, 1933, amounts to $10,972,500.

The sixth item represents interest and sinking fund on the First and Refunding Mortgage Bonds of the Interborough Company due January 1, 1933, which is estimated at $5,000,000. There are approximately $132,000,000 principal amount of these bonds in the hands of the public, and there are an additional $54,989,000 of these bonds pledged to secure the above-mentioned 7% Gold Notes of the Interborough Company.

The foregoing six items aggregate $50,796,400.

There have not been included in the foregoing the following items respecting the Manhattan Division, aggregating $2,743,136.60:

Manhattan Division real estate taxes for 1932, $1,720,000; I. R. T. Franchise Tax on account of "El" operations, past due, $81,136.60; payment due to the City under the Manhattan Certificate, $17,200; the Manhattan administration expenses, $25,000; Federal Income Tax of Manhattan, $10,000; dividend rental on Manhattan Unmodified 7% Stock, $76,140; and six months' interest due October 1, 1932, on Manhattan Consolidated Mortgage Bonds, $813,660.

Nor has there been included any amount on account of any expenditures which might be necessary should the Transit Commission's orders for additional equipment and lengthening of platforms be sustained by the courts.

OLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

Doc. 64
Opinion No. 1

# Opinion on Petitions of Interborough Receivers and of Manhattan Receiver as to Payment of Past-Due Taxes and Interest Due October 1, 1932, on Manhattan Bonds.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

1

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY *et al.*, Defendants. | In Equity E 70-364 |

MEMORANDUM

MANTON, J.:

16

The receivers were heretofore appointed and have qualified for the Interborough Rapid Transit Company and for the Manhattan Elevated Railway Company and are now in possession of their respective properties.

The receivers for the Interborough Company operate the system of both companies, the elevated railway property of the Manhattan Company being operated under a lease to the Interborough Company.

*American Brake Shoe Record.*
*Opinion No. 1.*

On the 28th of September, 1932, the receiver of the Manhattan Company petitioned this court for an order directing the receivers of the Interborough Company to pay the receiver of the Manhattan Company certain taxes which had theretofore been assessed against the property and interest on the Consolidated Mortgage Bonds of the Manhattan Company falling due on October 1, 1932. This petition for payment of interest and taxes is based upon the claim that the receivers of the Interborough Company have free moneys on hand, which might be used in payment of these items or might be an advance so that the Manhattan receiver may pay the interest on the Consolidated Mortgage Bonds.

The receivers for the Interborough Company appeared and asked instructions, first petitioning that a special master be appointed to hear and determine the questions presented by such receivers in their application (No. 9) and a supplemental petition filed thereto. In their petition, the receivers for the Interborough Company point out the involved financial condition of that company and a statement of the moneys held by them on September 30, 1932, with an estimate of claims and indebtedness payable by the Interborough Company. It is pointed out that cash on September 30, 1932, is $8,289,951.86 and that all of this sum is not available for the general purposes of the receivers. The following analysis is submitted:

| | |
|---|---|
| As of that date the amount held in the so-called corporate cash account of the receivers is | $1,383,345.79 |
| For the purpose of operating the Manhattan Division there was on hand cash in the sum of | 543,420.79 |
| Making a total of | $1,926,766.58 |
| From which there must be deducted vouchers in transit amounting to | 49,300.00 |
| Leaving a balance of | $1,877,466.58 |

But this balance is not available because is consists of the following items:

$5,317,468.51 held in a separate account for the purpose of operating the subway division of the Interborough Company and of this sum:

(1) $2,200,000 is payable to said receivers and was paid to them on October 1, 1932, as set forth;

(2) $233,424.26 representing capital moneys which the receivers believe are subject to the lien of the Interborough mortgage cannot be used except for capital expenditures as therein provided;

(3) $216,833.90 representing moneys in the Manhattan construction account under the Manhattan lease must be devoted to the purpose of improving the Manhattan elevated property;

(4) $393,443.55 is a special deposit because of the lien by the City of New York under agreement of August 30, 1929, pending the determination as to despatch items under the subway contracts;

(5) $33,428.22 a fund in trust to cover the death or disability of employees of the Interborough Company, which is a payment to those employees in the form of an insurance to which the employees have contributed and which is an addition to insurance under the Workmen's Compensation Act;

(6) $168,585.82 represents deposits on account of coupons and dividends, which coupons and dividends are long overdue and for which the holders thereof or the persons entitled thereto have not presented their claims.

On October 1, 1932, there was deducted from the item of $5,317,468.51, pursuant to the Interborough Company's Contract No. 3 with the City of New York, the sum of $2,200,000, having been transferred to the so-called corporate cash account. There was then available on October

1, 1932, less any deductions made as a result of expenditures on September 30, 1932, in the operation of the Manhattan division, the sum of $4,077,466.58. This latter sum includes $1,877,466.58, representing the cash on hand available to receivers for general purposes, plus the sum of $2,200,000 which the Interborough Company under Contract No. 3 had the right to draw down on September 30, 1932, from the cash on hand from the subway division operation.

Against the available cash on October 1, 1932, there are items as follows:

| | |
|---|---|
| Due the City of New York against the Interborough Company for taxes on Interborough property in the sum of..... | $ 510,000. |
| Supply and materials bills on account of materials and supplies to the Manhattan division ..... | 594,600. |
| Subway capital advances to December 31, 1932, of approximately..... | 200,000. |
| Real estate and special franchise taxes of the Manhattan Company in the sum of.. (which taxes are the subject of the petition presented by the receiver of the Manhattan Company). | 860,000. |
| Principal and interest on 7% notes of the Interborough Company due September 1, 1932 ..... | 32,780,623. |
| Principal and interest on 6% notes of the Interborough Company due October 1, 1932 ..... | 10,815,000. |
| Interest on the 4% Consolidated Mortgage Notes of the Manhattan Company, plus $25,000 administration expenses, plus ¼ of the dividend on 42,510 shares of 7% stock of the Manhattan Company which did not assent to the plan of readjustment, due October 1, 1932, totaling..... | 914,802. |
| Interborough Company state franchise tax on operation of the Manhattan division is also due, amounting to..... | 81,126.60 |

Counsel representing the Manhattan Company receiver and the trustee under the Consolidated Mortgage have

argued for the payment of the interest on the mortgage, claiming that funds are available to the Interborough Company receivers which may be used for that purpose.

On the return day of the respective petitions, October 3, 1932, it was thought that advances might be made to meet this interest obligation of the Consolidated Mortgage of the Manhattan Company and that the payment of taxes might be deferred until the receivers were in receipt of further funds. At that time it was suggested by the court that a statement be prepared setting forth the factual situation as to the financial position of the receivers in the matter of funds and obligations. When this statement appeared and on the settlement of the proposed order, it became clear that it would be necessary to take proof before a master to ascertain the facts so that the court might be advised and better informed before directing the payment of the interest on the mortgage bonds or directing an advance to the Manhattan Company receiver to meet this obligation which might later be repaid as an item of reasonable rent for use and occupation or as a set off for rent during the trial period of operation by the receivers before the lease was affirmed or disaffirmed or to be charged against net profits of operation in the event of a disaffirmance or against the rental obligations in the event of an affirmance of the lease. (Penn. Steel Co. v. N. Y. Ry. Co., 198 Fed. 721; Amer. Brake Shoe Co. v. N. Y. Railway Co., 282 Fed. [2d] 547.)

Counsel for the noteholders' committees of Interborough Company have presented figures from which they argue that the Manhattan Elevated Railway Company during that period will be operated at a loss and that there will not be net profits from operation which might be used to repay the advances made by the receivers of the Interborough Company. For these reasons, it is said that proper protection cannot be given to the receivers of the Interborough Company and that, if payment were made a preference might be granted to the creditors of the Manhattan Company, namely, the bondholders. And it is

argued that reservation of the rights and equities can be effectively decreed only if a fund is available or there is a reasonable estimate that a fund will be available to satisfy such rights and equities when they are determined.

The receivers for the Interborough Company estimate the Manhattan division's income from April 1, 1931, to April 1, 1932, shows approximately $130,000 available and the estimate for the next six months ending March 31, 1933, shows a deficit of $193,000 instead of a fund created by the operation of the property for payment of the interest to the Manhattan Company's mortgage creditors. It
31 would thus appear that there would be a deficit. There is interest accruing on the $4,500,000 second mortgage of the Manhattan Company.

From the statement of the Interborough Company receivers, it appears that cash on hand was derived principally from the subway division and to a less extent from the Manhattan division, the amount of which is not made clear. Within the next four months the Interborough Company receivers will have to make provision for the payment of the sums above referred to. There is uncertainty as to their ability to do so. But in any case, upon the record now before me showing cash on hand and the allegations thereof, prospective earnings and operating expenses it would appear unwise to advise the receivers at this time to make the payments.

32 In order to avoid the granting of a preference by making advances which the Manhattan Company may not be able to return, it is a better course to refer the matter to a special master who will take testimony and make his report before the 60-day period under the terms of the Consolidated Mortgage of the Manhattan Company has expired.

An order will, therefore, be entered referring the matter to a special master with directions to make his report within the time specified. Upon the receipt of that report, counsel will be heard further on the petition to pay the interest and taxes.

(Filed in Clerk's Office, October 11, 1932.)

Doc. 65

## Answer of Central Hanover Bank and Trust Company, as Trustee, to Petition of Interborough Receivers, Verified September 28, 1932.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity No. E 70-364 |

1

*To the Honorable, the Judges of the District Court of the United States for the Southern District of New York:*

Now comes Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Company, and answers the petition herein of 16
Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, verified September 28, 1932, as follows:

I. It denies that it has any knowledge or information thereof sufficient to form a belief as to the truth of the allegations contained in said petition, except as hereinafter set forth.

*American Brake Shoe Record.*
*Answer of Central Hanover to Petition.*

II. It is informed and believes that the allegations contained in paragraphs 1, 3, 5, 6, 7, 8, 11 and 14, which refer to certain instruments, copies of which are alleged to be annexed to said petition, are in most respects true and correct, but for a full and proper statement of the contents and effect of said instruments, petitioner prays reference to said instruments or to copies which this respondent may have the opportunity to verify as correct.

III. It admits that under date of January 1, 1903, Manhattan Railway Company (hereinafter referred to as Manhattan) entered into a lease with the defendant herein (hereinafter referred to as Interborough), pursuant to which Manhattan leased its property as therein provided; that included in the property leased were the elevated railroad lines known as the Ninth Avenue line, the Third Avenue line, the Second Avenue line, and the Sixth Avenue line; that, by the terms of Articles Sixth and Seventh of said lease, Interborough agreed to make the payments therein provided for, and in addition agreed to pay, among other things, all taxes and assessments levied or imposed against the Lessor, its stock or dividends or railroads or other property; that on or about March 19, 1913, the Public Service Commission for the First District issued to Manhattan a certificate authorizing the construction of additional tracks on its Second Avenue, Third Avenue and Ninth Avenue elevated lines, and that said certificate was subsequently amended by certificate dated May 22, 1914; that on May 31, 1932, there became due and payable certain real estate taxes and special franchise taxes on property of Manhattan, and that on June 22, 1932, Manhattan demanded that Interborough pay said taxes or deposit in a bank or trust company the amount thereof; that on October 1, 1932, there will become payable a semi-annual installment of interest amounting to $813,660 upon the outstanding $40,683,000 Consolidated Mortgage 4% Bonds of Manhattan.

Further answering this respondent refers to and makes a part hereof the petition herein of this respondent to be submitted herewith upon the hearing under the petition to which this answer is made.

WHEREFORE, this respondent prays that such relief be granted herein as is prayed for in last-mentioned petition.

Dated, October 1, 1932.

CENTRAL HANOVER BANK AND TRUST COMPANY,
as Trustee under Consolidated Mortgage of
Manhattan Railway Company,
By DAVIES, AUERBACH & CORNELL,
Its Solicitors.

H. C. MCCOLLOM,
Counsel.

Doc. 66

## Petition of Chadbourne, Stanchfield & Levy to Terminate Their Appointment and Employment as Solicitors and General Counsel for the Interborough Receivers.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

1643

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,

against

INTERBOROUGH RAPID TRANSIT COMPANY *et al.*,
Defendants.

*To the Honorable Martin T. Manton, U. S. Circuit Judge Designated to Hold a Term of the District Court for the Southern District of New York:*

1. At the time of the appointment of Messrs. Dowling
1644 and Murray as temporary receivers in the above-entitled suit on August 26, 1932, my firm of Chadbourne, Stanchfield & Levy was designated by the court to serve as solicitors for said temporary receivers. An order to show cause was then entered, directing that a hearing to parties and all other persons interested upon the question of the appointment of permanent receivers be had on September 22nd, of which hearing notice was widely published and served upon all the parties who had appeared. At the

time of the hearing on September 22nd, no objection whatever was made by anyone to the designation of my firm or their continuance as solicitors for the receivers as aforesaid, and we have continued to serve in that capacity.

2. Since the appointment of said temporary receivers on August 26th as aforesaid, there has been public criticism of our appointment as solicitors for the receivers on the ground, among other things, that my firm and I personally have heretofore represented creditors of the Interborough Company; that I have heretofore been personally interested in securities of the Interborough and Brooklyn-Manhattan Companies; and that my firm has acted as attorneys for the Brooklyn-Manhattan Company, and it has been urged that such representation or interest constituted an objection to my firm serving as solicitors for the receivers of the Interborough Company.

I believed and understood at the time of our appointment by the court as solicitors for the temporary receivers that my past interests in and associations with these two companies were matters of record and public knowledge and well known to the parties to this suit and others interested in the subject matter.

3. The receivership in the above-entitled suit is one of the most important that has ever been instituted in this circuit. Property interests of over six hundred millions of dollars in securities or value are involved and the rights of many thousands of security holders. It is, of course, important to all interests, whether as creditors or stockholders, or the public at large, that there be an orderly and prompt administration of such a receivership and that no extraneous matters should arise which would deflect attention from the substantial issues involved.

I had supposed that my well-known connection with traction matters in New York and the resulting knowledge

and experience which I gained thereby would be helpful to the efficient administration of this receivership.

4. I and the members of my firm have determined that the criticisms made of us as solicitors for the receivers, although unjustified, may embarrass and delay and continue further to embarrass and delay the prompt, orderly, economical and effective administration of the Interborough receivership, and we have, therefore, concluded that the adequate and due administration of this receivership is more important than the continuance of any particular solicitors for the receivers and that it is in the public interest that this irrelevant issue should be eliminated. For these reasons, we have determined to discontinue our employment as solicitors for the receivers of the Interborough Rapid Transit Company and respectfully pray that other solicitors be appointed in our place and stead.

All of which is respectfully submitted.

New York, October 10, 1932.

(Sgd.) THOMAS L. CHADBOURNE,
CHADBOURNE, STANCHFIELD & LEVY.

Doc. 66c

## Affidavit by Nathan L. Miller, of Hornblower, Miller, Miller & Boston, Solicitors and General Counsel for the Interborough Receivers.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,
against
INTERBOROUGH RAPID TRANSIT COMPANY, *et al.*,
Defendants.

*Before the Honorable Martin T. Manton, United States Circuit Judge Designated to Hold a Term of the District Court of the United States for the Southern District of New York:*

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

NATHAN L. MILLER, being duly sworn, deposes and says:

I am a member of the firm of Hornblower, Miller, Miller & Boston, attorneys and counsellors at law, whose office is at 15 Broad Street, Borough of Manhattan, City and State of New York, and I have been a member of said firm for approximately two years; that the partners of said firm, in addition to deponent, are William W. Miller, Charles A. Boston, Carl M. Owen, Harold Otis, Edward C. Bailly, H. Bartow Farr, Raoul E. Desvernine, Harold H. Corbin, Harold J. Gallagher, Charles M. Walton, Jr., and Claude M. Terrell.

To the best of my knowledge, I have had no business, professional or other connection and neither the said firm

nor the members thereof have had any business, professional or other connection during one year prior and up to the date of this affidavit with the subject matter of the suit herein, the parties hereto, the solicitors for the parties hereto, any creditor of the defendant herein, or any other person interested in this cause or in the receivership estate.

Deponent has not nor has the said firm of Hornblower, Miller, Miller & Boston or any of the members of said firm, appeared in this cause for or acted in this cause for a party or for any creditor of the defendant herein, whether an intervenor or not, or for any other person interested in the cause or the estate.

Deponent has been admitted to the bar of this court and has practiced at the bar of this court for many years; deponent is also a member of the bar of the State of New York and of the United States Circuit Court of Appeals for the Second Circuit and of the Supreme Court of the United States. Deponent and members of his firm have had extensive experience and familiarity with the principles and practices likely to be involved in this cause, having acted as solicitors for the receivers in other receiverships of a similar character to the receivership herein, such as for example, the receivership of the Brooklyn Rapid Transit Company (in this court), the Chicago, Milwaukee & St. Paul Railroad Company and the Seaboard Airline Railway Company.

NATHAN L. MILLER.

Subscribed and sworn to before me
this 11th day of October, 1932.

MAE J. CANNON,
Notary Public,
Kings County.
Kings County Clerk's No. 92.
Register's No. 4088.
N. Y. County Clerk's No. 166.
Register's No. 4C85.
My commission expires March 30, 1934.

## Affidavit of J. Osgood Nichols.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON,<br>*Complainant,*<br>*against*<br><br>MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,<br>*Defendants.* | IN EQUITY<br>E 71-153<br>1932. |

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

J. OSGOOD NICHOLS, being duly sworn, deposes and says:

1. I am an attorney at law, a member of the bar of the State of New York and of this Court, and am familiar with the matters hereinafter referred to.

2. It appears from the records in the United States District Court for the Southern District of New York that

1660 *Affidavit of J. Osgood Nichols.*

E. Henry Lacombe, when Senior Circuit Judge of the United States Circuit Court of Appeals for the Second Judicial Circuit, pursuant to Section 18 of the Judicial Code (now Title 28, Section 22 of the United States Code), entered an order in the year 1912, and one each in the years 1913, 1914 and 1915, designating himself to hold a District Court for the Southern District of New York; that H. G. Ward, when Senior Circuit Judge of the United States Circuit Court of Appeals for the Second Judicial Circuit, pursuant to said Section 18 of the Judicial Code, in the years 1918 and 1919 similarly
1661 designated himself to hold a District Court for the Southern District of New York; that Henry Wade Rogers when Senior Circuit Judge of the United States Circuit Court of Appeals for the Second Judicial Circuit, pursuant to said Section 18 of the Judicial Code, in the year 1923 similarly designated himself to hold a District Court for the Southern District of New York once in that year; and that Charles M. Hough, when Senior Circuit Judge of the United States Circuit Court of Appeals for the Second Judicial Circuit, in the year 1926 similarly designated himself to hold a District Court for the Southern District of New York.

Attached hereto are copies of said orders. It will
1662 be observed that in the orders entered by Judge Lacombe January 17, 1913, he designated himself to hold a District Court in specific suits pending in that Court.

Under date of March 20, 1930, Senior Circuit Judge Martin T. Manton designated himself to hold a District Court in the Southern District of New York. A copy of that order is attached hereto.

2a. I am informed by William F. Caverly, who has made a diligent search of the records in the Court for the Southern District of New York, that there is not in the files of that Court any record of an assent to or approval of Equity Rules 1-a and 11-a of the District Court for the

Southern District of New York, by a majority of, or by any of, the Circuit Judges for the Second Judicial Circuit.

3. I am informed and believe that Senior Circuit Judges in the First Judicial Circuit have, since the enactment of said Section 18 of the Judicial Code of the United States (now Title 28, Section 22 of the United States Code) frequently designated themselves to hold District Courts in the First Judicial Circuit, and that several times such Senior Circuit Judges, when holding District Courts, have appointed receivers in equity. In the same period of time, in the Third Circuit, Senior Circuit Judge Buffington has frequently designated himself to and has held a District Court. In the Fourth Circuit, Senior Circuit Judges, in the same period of time, have appointed themselves sixteen times to hold a District Court, and in three of such instances the designation orders have designated the Senior Circuit Judge to hold the District Court to conduct proceedings in specifically named suits. During the same period, in the Seventh Circuit, Senior Circuit Judge Baker often assigned himself to sit as a District Judge. The present Senior Circuit Judge of the Seventh Circuit, Circuit Judge Alschuler, at the beginning of each term, designates all the Circuit Judges, including himself, to sit in the District Court for the Northern District of Illinois, so that, as occasion arises, he or any other of the Circuit Judges can enter orders and hear cases in the District Court. Judge Alschuler, under such designation orders, has often heard cases in that District Court and entered orders. He has also designated himself to hold a District Court in Wisconsin. In the Eighth Circuit, in 1928, Senior Circuit Judge Stone designated himself to hold a District Court, and held the District Court for one week. Since the organization of the Tenth Circuit on April 1, 1929, the Senior Circuit Judge has on one

occasion designated himself to hold a District Court and acted pursuant to such designation. The sources of this information are communications from various attorneys having offices in the cities in which the sessions of the several Circuit Courts of Appeals are held, who have communicated with the Clerks of the District Courts of such cities, or examined the designation orders on file in those District Courts. A copy of an order by Judge Waddill, designating himself to sit in a particular removal proceeding, is attached hereto.

4. I am informed that since the beginning of the year 1931 and up to the present time, twenty-nine United States District Judges, regularly appointed to Districts other than the Southern District of New York, have been designated to hold a District Court in the Southern District of New York. Recently, in April and May, 1929, two additional judgeships were created for the Southern District of New York, to relieve the congestion therein.

5. In the New York Times for October 6, 1931 it was stated that in the report of the conference of the Senior Circuit Judges, signed October 5, 1931 by Chief Justice Hughes, speaking of the heavy calendars in some of the district courts, it was said:

> "In some districts there is a serious condition which demands relief * * * It is deemed undesirable that except where absolutely necessary judges should be called to service outside their circuit."

He also said, in the same report, as also quoted in the New York Times for October 6, 1931:

> "the congestion in the federal district courts * * * continues to be a major problem."

In his annual report for 1931, the Attorney General of the United States, speaking of the congestion in the Southern District Court for New York, said (at page 4):

"In that district both civil and criminal dockets are terribly congested. Private litigants are suffering from delay."

In the New York Times for October 4, 1932, the following appeared:

"JUDGES DEMAND LAWS TO SPEED UP APPEALS

*Conference at Washington Urges Court Power to Eliminate 'Excessive Delays.'*

WASHINGTON, Oct. 3 (A. P.).—Judges of the nation's senior circuit courts today declared in favor of legislation to speed up the machinery of the law by avoiding undue delays in cases under appeal.

In a report on their annual judicial conference made public by Chief Justice Charles Evans Hughes, they approved a measure pending in Congress to give the United States Supreme Court power to prescribe rules for proceedings in criminal cases after verdict.

The legislation also was favored by Attorney General Mitchell, who expressed the view that under it rules could be framed to eliminate 'excessive delays' of from nine months to three years that may intervene between a verdict and the final mandate upon appeal.

At the same time the conference said 'it is especially noteworthy that there has been a decrease of 4,775 in the number of criminal cases pending' in the year, although cases begun numbered 92,174 against 83,747 the previous year.

It also called attention to figures from the Attorney General showing that prohibition cases pending at the close of the last fiscal year totaled 15,360 against 18,555 the previous year, although there was an increase of 8,555 in the number of these cases instituted.

A resolution was adopted urging district judges to accept willingly assignments outside their districts when the senior circuit judge

should find such action necessary to prevent congestion.

The working of the probation law was commended by the conference and its further extension was recommended, especially in cases where the punishment is one year or less.

The conference approved pending legislation that would make the husband or wife of a person charged with crime in the Federal courts a competent, but not compellable, witness for or against the accused.

The group renewed its recommendation for the appointment of two additional judges in the
1673 Southern District of New York, two in the Southern District of Texas and one each in Eastern New York, Northern Georgia, West Virginia, Southern Texas and Western Missouri.

In addition it urged legislation that would permit vacancies to be filled by new appointments when certain temporary judgeships created by Congress expire by retirement of the incumbents."

6. In the New York Times for June 30, 1932, it was reported that expenses of the federal courts in the Second Circuit would be drastically reduced. No money, it was reported, would be appropriated for expenses of travel and subsistence for law clerks and stenographers
1674 and it was further reported that travelling judges' expenses for subsistence would be reduced from $10 per day to $6 per day. It was hoped that there would be sufficient funds after October 1, 1932 to authorize a reasonable amount of travelling expenses for law clerks and stenographers to judges.

7. The New York Times for July 6, 1932, contained the following:

"Outside Federal Judges Refuse to Sit Here as Economy Order Cuts Their Allowances.

Five judges instead of the customary nine were sitting yesterday in Federal Court at the beginning of a heavy July calendar and the generally

accepted explanation for this at the Federal Building was that the economy order, issued by the Attorney General last month, had influenced many jurists from other districts not to accept invitations to sit here. That order reduces expense allowances of visiting judges from $10 a day to $6.

Only one judge from out of town has accepted an invitation to sit here during the month of July, while some of the local judges are on vacation.

The judge who accepted the invitation is Judge Isaac M. Meekins of North Carolina, who is scheduled to arrive here to help relieve the congested calendars on July 25.

Only three other judges—T. Blake Kennedy of 1676
Wyoming, Robert R. Nevins of Ohio and Harry B. Anderson of Tennessee—have consented to serve here for any month of the Summer season and these judges are not scheduled to report until September.

In past years the beginning of the July term found from twelve to sixteen judges sitting in this district and of these most were visiting jurists, who billed the government not only for their own traveling expense, but for the traveling expenses of their clerks, stenographers or secretaries.

The new order, it is said, not only makes visiting to this district prohibitive, but inasmuch as traveling expenses are denied to clerks and secretaries the jurists feel that their own services would 1677
be hampered."

8. In the order by which Judge Manton appointed receivers for Interborough Rapid Transit Company in the suit of American Brake Shoe and Foundry Company against Interborough Rapid Transit Company, In Equity E-70-364 (hereinafter sometimes referred to as the American Brake Shoe suit), now pending in this Court, it was provided as follows:

"And it is further ordered that the parties hereto show cause before the undersigned at Room 439 at the United States Post Office Building in the City of New York on the 22nd day of September,

1678 1932, at 10:30 o'clock in the forenoon, why the said receivership should not be continued during the pendency of this suit and upon the hearing thereon any other creditor of the defendant or other party in interest may be heard."

8a. In Judge Manton's order dated September 6, 1932, entered in the same cause, extending the receivership to Manhattan Railway Company and its property and assets and appointing a temporary receiver therefor, it was provided:

1679 "AND IT IS FURTHER ORDERED, that the parties hereto show cause before the undersigned at Room 439 at the United States Post Office Building in the City of New York on the 22nd day of September, 1932, at 10:30 o'clock in the forenoon, why the extension of said receivership to said Manhattan Railway Company and its said property and assets should not be continued during the pendency of this suit and upon the hearing thereon any other creditors of the defendant or other party in interest may be heard."

On September 13, 1932, there was given public notice of said hearing to be held on September 22, 1932, in the New York Evening Post. A hearing was held in accord-
1680 ance with the foregoing on September 22, 1932, before Judge Manton. At that hearing objections to the continuance of the receivership were made by the following and no other persons: Elon S. Hobbs, an attorney, who stated that he was appearing for himself and others; an attorney, James P. Kohler, who appeared for himself as the owner of $6,000 face value of 7% Notes of Interborough and $2,500 face amount of certain Manhattan securities; and Marshall & Wehle, as attorneys for a committee for holders of unmodified stock of Manhattan, who stated that they were not asking for the termination of the Interborough receivership but were making a motion to terminate the Manhattan receivership. At the

close of the hearing Judge Manton announced that he would continue the receivership, and on September 28, 1932, he entered a formal order to that effect continuing the Receivers Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of Interborough Rapid Transit Company (hereinafter for convenience referred to as Interborough) and William Roberts as Receiver of Manhattan Railway Company (hereinafter for convenience referred to as Manhattan).

9. I am informed and believe that the receivership of Interborough is the most important receivership that has ever occurred in New York. The Interborough Company has outstanding capital stock amounting to $35,000,000, outstanding first mortgage bonds in the amount of $132,000,000, in addition to $54,000,000 of such bonds pledged to secure $31,000,000 of 7% Gold Notes. In addition, the Company has outstanding $10,500,000 of 6% Gold Notes. In those receivership proceedings there is also involved the receivership of Manhattan, which has outstanding capital stock of $60,000,000, outstanding first mortgage bonds of $40,683,000 and outstanding second mortgage bonds of $4,523,000. The investment of the City of New York in the subways, which are operated by the Interborough Rapid Transit Company, is, according to a recent statement by the Corporation Counsel of the City of New York, over $300,000,000. The Interborough subway and elevated system employs more than 18,000 men, and its railroad lines last year carried over 1,000,000,000 passengers. The Interborough has 54.57 miles of railroad trackage, and 170.34 miles of single track, located within the Southern District of New York; and 32.31 miles of route mileage, and 62.95 miles of single track, located within the Eastern District of New York. The Manhattan Company owns 42 miles of railroad trackage, and 139 miles of single track, all located within the Southern District of New York.

1684 *Affidavit of J. Osgood Nichols.*

10. By orders of court in the *American Brake Shoe* suit, the following have intervened:

(1) A Committee constituted and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company's Ten-Year Secured Convertible 7% Gold Notes, of which Notes there are outstanding in the hands of the public more than $31,672,100.

(2) A Committee for Interborough Rapid Transit Company First and Refunding Mortgagee 5% Gold Bonds, of which Bonds there are out-
1685 standing in the hands of the public more than $132,000,000.

(3) A Committee for the Protection of the Holders of Ten-Year Six Per Cent Gold Notes due October 1, 1932, of Interborough Rapid Transit Company, of which Notes there are outstanding in the hands of the public more than $10,500,000.

(4) A Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, of which Bonds there are outstanding in the hands of the public more than $40,683,000.

(5) A Protective Committee for 7% Guaran-
1686 teed Stock of Manhattan Railway Company, of which Stock there is outstanding in the hands of the public more than $4,351,000.

(6) Central Hanover Bank and Trust Company as Trustee under the Consolidated Mortgage of Manhattan.

There are pending before or have been decided by Judge Manton in that suit, among others, the following matters:

(1) A petition by the Receivers of Interborough for instructions respecting payments of

large sums of money under the lease agreements between Manhattan and Interborough.

(2) A petition by the Receiver of Manhattan for an order directing the Receivers of Interborough to pay interest due under the Interborough-Manhattan lease agreements.

(3) A petition by the Trustee of Manhattan's Consolidated Mortgage Bonds for the appointment of a receiver of the property of Manhattan subject to the mortgage securing such bonds and impounding of alleged income of Manhattan.

(4) An application by the Receivers of Interborough for instructions with respect to making a demand upon Guaranty Trust Company for payment of moneys held by Guaranty Trust Company under sinking fund provisions of the First and Refunding Mortgage of Interborough.

The records of all of the proceedings had heretofore in the American Brake Shoe action in the Southern District of New York, and in the ancillary proceedings in the American Brake Shoe action in the Eastern District of New York, are attached hereto, marked Exhibits A and B respectively, and made a part of this affidavit as fully as if set out herein in full.

11. I am informed and believe that Victor J. Dowling, one of the two Receivers of the Interborough Rapid Transit Company appointed by Judge Manton, is one of the leading jurists of New York State. He has practiced law since 1887. He became a Justice of the New York Supreme Court in 1905, and in 1910 Governor Charles Evans Hughes designated him Justice of the First Department of the Appellate Division of the State of New York. He was redesignated to that position by Governor Whitman in 1915 and by Governor Smith in 1920. He became Presiding Justice of that court in

1690 1927 and held that position until 1931, during which time he was, as Presiding Justice, the executive head of the courts in this department, displaying marked and universally approved ability in the discharge of those executive and administrative functions. He is a Vice-President of the Association of the Bar of the City of New York and a director of the New York County Lawyers Association. He was appointed by Governor Roosevelt and is now acting as a member of the New York State Commission on the Administration of Justice. Until recently he was a director of The Equitable
1691 Life Assurance Society, but after his appointment as a Receiver of the Interborough Rapid Transit Company, he resigned that directorship, because The Equitable Life Assurance Society was interested in securities of the Manhattan Railway Company.

I am informed and believe that Thomas E. Murray, Jr., is an engineer of long experience and high repute, having recently received distinguished academic honors as an engineer; he is the President of Metropolitan Engineering Company, and of Metropolitan Device Company and Chairman of the Board of Thomas E. Murray Inc., consulting engineers, and as such has had much experience with the affairs and operations of public
1692 utilities.

12. On August 29, 1932, a bill was filed in this Court entitled "Harry Barber, Complainant, against Manhattan Railway Company, Interborough Rapid Transit Company, subject to leave of Court, Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of the Interborough Rapid Transit Company, and The City of New York, Defendants, In Equity, No. E 71-39", wherein the complainant, Harry Barber, asked that a receiver be appointed for Manhattan Railway Company (hereinafter sometimes referred to as "Manhattan").

13. Prior to the filing of the Barber bill and on or about August 25, 1932, the American Brake Shoe suit

had been begun by the filing of a bill against Interborough Rapid Transit Company, Defendant, In Equity E 70-364. That bill asked for the appointment of Receivers of the defendant Interborough Rapid Transit Company (hereinafter sometimes referred to as Interborough). On the bill and the answer by Interborough which expressly admitted the allegations of the bill and consented to the appointment of a receiver therein, Circuit Judge Martin T. Manton, holding a District Court for the Southern District of New York, appointed Victor J. Dowling and Thomas E. Murray, Jr., temporary Receivers of Interborough and of its property and assets, on August 26, 1932.

14. Said receivers of Interborough Rapid Transit Company were named as parties defendant in the bill in the suit brought by Barber, and Barber, by his attorney, Lawrence Berenson, on August 29, 1932, procured an order from Circuit Judge Manton permitting Interborough and those receivers to be made parties defendant in Barber's suit; said order was entered pursuant to a petition by Barber, sworn to by Lawrence Berenson, which alleged that Victor J. Dowling and Thomas E. Murray, Jr., "were duly appointed Receivers" of Interborough, and which also alleged that the order appointing such Receivers contained provisions restraining the institution or prosecution of suits against Interborough Rapid Transit Company. At the same time Judge Manton, on the petition of Barber, sworn to by his attorney, Lawrence Berenson, entered an order, directing the defendants named in the Barber bill, to show cause, returnable at 10:30 o'clock in the forenoon on September 6, 1932, before Judge Manton, why a receiver should not be appointed for Manhattan.

15. On the return day, September 6, 1932, a hearing was had before Judge Manton and at that hearing there appeared, among others, Lawrence Berenson, the attorney for Barber; Arthur Berenson, his brother, a Massa-

chusetts lawyer, who appeared personally as a shareholder of Manhattan; Charles Franklin, who stated that he was counsel for a committee called "MANHATTAN COMMON STOCKHOLDERS' PROTECTIVE COMMITTEE" composed of Nathan L. Amster, Morton F. Stern, Hon. Peter Ten Eyck, Edward M. Hamlin, Michael O'Keefe, C. R. Jeffers, Blin W. Page, and Charles Franklin himself, and also on behalf of Brookin Corporation, and Llewellyn Hernly, who had deposited stock with said Committee. There also appeared an attorney, Louis Boehm, who stated that he was counsel for certain stockholders of Manhattan.

16. Said Franklin and Boehm each said that their clients were intervening in the Barber suit. In the course of the hearing before Judge Manton, Mr. Franklin stated that it was the condition of Manhattan that "caused *our bill* to be filed", referring to the Barber bill. At that time there was presented to Judge Manton a petition for intervention in the Barber suit on behalf of Charles Franklin, said Manhattan Railway Company Common Stockholders' Committee and Brookin Corporation, together with a proposed order allowing these parties to intervene in the Barber suit. Copies of the bill of complaint; the order to show cause made by Judge Manton on August 29, 1932, upon a petition made by Lawrence Berenson, verified August 29, 1932; the order of Judge Manton granting leave to Barber to file his bill of complaint, upon a petition made by Lawrence Berenson, verified August 29, 1932; said petition for intervention, and said draft of a proposed order allowing such intervention are attached hereto, marked Exhibit C, and made a part of this affidavit as fully as if set out herein in full.

17. When these lawyers appeared, Judge Manton advised them that, on the intervening petition of Manhattan theretofore filed in the Interborough receivership proceedings, he had already appointed William Roberts, President of Manhattan, as temporary receiver of Manhattan. Thereupon, Mr. Franklin urged Judge Manton

to appoint Nathan L. Amster as an additional receiver of Manhattan. Mr. Boehm asked Judge Manton to appoint as additional receiver Malcolm Sumner. Mr. Arthur Berenson suggested that, as an additional receiver, Judge Manton should name either Mr. Amster or Mr. Sumner. Certain of the remarks of Messrs. Boehm, Franklin, Arthur Berenson and Judge Manton at said hearing were as follows as deponent is informed and believes:

> "Mr. Boehm: I represent 10,000 shares of stock and about $140,000 of bonds, and what we were desirous to accomplish upon this application is the appointment of receivers who would be independent of the Interborough interests.
>
> The Court: You have that, the president of the Manhattan.
>
> Mr. Boehm: Unfortunately, we don't consider him sufficiently independent of the Interborough interests because under his management and under the management of the present board of directors we feel that the interests of the Manhattan have been neglected.
>
> * * * * * * * *
>
> Mr. Franklin: I filed an intervention this morning on behalf of the owners of more than 100,000 shares of Manhattan Railway stock and also some bonds. The so-called Manhattan Railway Company stockholders' committee, of which Mr. Nathan L. Amster has been the chairman for several years. Also the Brookin corporation. I feel, speaking for them, that even in the present situation and even with a temporary receiver, that it would be proper to appoint a co-receiver with Mr. Roberts in order to properly protect certain interests as to which there is a very very strong feeling in the minds of those who are stockholders that there will not be independent action or protection of certain matters that should be taken up promptly. First, there has never been an accounting between the Manhattan and Interborough, although the Manhattan holders have been entitled to such an accounting at Interborough expense. The lease provides for it.
>
> * * * * * * * *

1702 The Court: I don't see why we need two receivers at this time. I selected the president of the road because he is familiar with it and therefore, as I see it, at this time the important thing is the collection of rents, distribution, calling the board together, action in the matter of differences, nothing by way of operation, and if the day ever comes when operation becomes necessary by the elevated railway, then I agree with you thoroughly, and then I will appoint the other receiver. The only thing at the present time is whether Mr. Roberts has the stern integrity and sufficient erudition to run this affair.

1703 Mr. Franklin: My suggestion was to name Mr. Amster.

The Court: That has been suggested by Mr. Berenson and I will be very glad to consider it.

* * * * * * * *

Mr. Franklin: I think two would be all that are necessary. We feel at this time that the outside interests so-called, representing very substantial interests—the interests I represent are about $10,000,000 of par of this stock, including bonds—we feel that Mr. Amster who is already a director of the Manhattan Company, and who has been closely allied with it for years, at the last meeting more than half of the Manhattan stock voted for Mr. Amster.

1704 The Court: That is something to have in mind, when another receiver comes along.

Mr. Franklin: We strongly urge that your Honor will consider, to make this receivership entirely above criticism, that it would be right and pleasing I think to all the stockholders and bondholders to have someone acting with Mr. Roberts, if only for the sake of having two receivers instead of one.

* * * * * * * *

Mr. Franklin: What we are interested in and want to join in, and I would like to present one myself, is to have somebody completely independent of the Interborough.

The Court: Here is a large property. Do you think it would be right for me to take out the President and put in somebody——

Mr. Arthur Berenson: We don't ask you to do that. We ask you to appoint a co-receiver.

The Court: I will appoint him any time it is necessary.

Mr. Boehm: I would like to suggest the name of Malcolm Sumner, who is familiar with the stock interests, familiar thoroughly with the situation, and who is also a man of ability.

The Court: When that time comes I will be glad to consider it.

* * * * * * * *

Mr. Arthur Berenson: That is quite right, but I don't object to Mr. Roberts. I would very much like to have your Honor appoint somebody also with Mr. Roberts, and we urge very strongly that your Honor should appoint Mr. Amster. We would be agreeable to Mr. Sumner or any other disinterested person, or somebody whose interests are very much like them, in behalf of the stockholders and bondholders of the Manhattan Railway Company.

I understood from Mr. Amster with whom I had a talk the other day, that the $800,000 of taxes, which were due upon the Manhattan properties and which the Interborough was under obligation to pay, which they had the money to pay and could have paid if they wanted to—when Mr. Amster called attention to that at the board meeting and asked them to take the matter up with the Interborough for the purpose of seeing to it that that $800,000 in taxes was paid, which would have caused a breach of conditions of the Manhattan lease, not only the lease but also the bonds, and would be likely to jeopardize a foreclosure of the property and a wiping out of the interest of the shareholders—he got scant attention from the directors, who did nothing whatsoever about it, and that $800,000 is due now and has been due for some time, overdue, and nothing has been done to press the Interborough towards paying those taxes.

Mr. Roberts: I want to say right there——

Mr. Franklin: May I state——

The Court: I do not see how that is material just now.

Mr. Franklin: It is a thing that alarmed us very much, and caused our bill to be filed.

* * * * * * * *

Mr. Arthur Berenson: We think that the Manhattan, being an entirely different corporation from the other corporation, that it has the right under the circumstances to come in here and ask this Court in a separate proceeding, filed here first, to ask this Court to appoint receivers under that bill. It may be there is a practice which permits the Manhattan in the I. R. T. Receivership to come in and be heard, but that I submit does not
1709 prevent our bill from being filed asking for the appointment of receivers.

The Court: It is and will remain on file of course."

At the conclusion of the hearing, Judge Manton stated that he would deny the application for the appointment of a receiver for Manhattan in the Barber suit.

18. Thereafter, on September 9, 1932, Judge Manton entered a formal order in the Barber suit denying the application for the appointment of a receiver in that suit. Subsequently, by stipulation with Berenson, as attorney for Barber, the time of several of the defendants (in-
1710 cluding the receivers of Interborough and the receiver of Manhattan but excluding the City of New York) to plead or answer the bill in the Barber suit, was continued until October 16, 1932. The Barber bill is still on file, and the time of the defendants for filing answers or other pleadings has not expired. No further proceedings were taken in that suit, except that the City of New York, on September 27, 1932, moved before Judge Mack, holding a District Court for the Southern District of New York, sitting in the Motion Part, that the bill be dismissed for lack of proper service. Judge Mack at once referred this motion to Judge Manton who, on September 27, 1932, entered an order dismissing the Barber suit as to the City of New York.

19. Charles Franklin and Louis Boehm, above referred to, are, respectively, the attorney for the complainant and of counsel for the complainant in the suit of Johnson against Manhattan Railway Company et al., In Equity E 71-153, now pending before this Court. That bill was filed September 21, 1932, or some fifteen days after Mr. Franklin and Boehm had sought unsuccessfully to persuade Judge Manton to appoint a receiver for Manhattan and some twelve days after Judge Manton had entered his formal order in the Barber suit. Charles Franklin verified the bill in that Johnson proceedings and also verified the petition in the Johnson proceedings pursuant to which Judge Caffey entered an *ex parte* order permitting Interborough, and Manhattan and the Receivers of Interborough (appointed by Judge Manton in the *American Brake Shoe* suit), and the Receiver of Manhattan (appointed by Judge Manton in the same suit), to be made parties defendant in the Johnson proceedings; that petition alleged that the order appointing such receivers contained provisions restraining the institution or prosecution of suits against Interborough and Manhattan. The said Charles Franklin also verified the petition pursuant to which Judge Caffey entered the order to show cause in the Johnson proceedings returnable October 4, 1932. Also, on September 21, 1932, Judge Caffey, upon the petition of Lillian Boehm, entered an *ex parte* order allowing her to become a party in the Johnson suit. Lillian Boehm appears by Boehm & Zeigler, solicitors, Louis Boehm of Counsel.

Subsequently, on or about September 24, 1932, the Manhattan Railway Company Common Stockholders' Protective Committee, the Brookin Corporation and Llewellyn Hernly (all of whom, by Charles Franklin, had appeared before Judge Manton in the Barber proceedings on September 6, 1932), filed a petition in the Johnson proceedings, asking leave to intervene therein. In these proceedings Charles Franklin is named as attorney for the petitioners in said petition and Charles Franklin

1714 *Affidavit of J. Osgood Nichols.*

verified the petition, and he is a member of said Manhattan Railway Company Common Stockholders' Protective Committee. Pursuant to this petition, an *ex parte* order was entered on September 26, 1932, allowing the petitioners to intervene in the Johnson proceedings. On October 1, 1932, upon the petition and supplemental bill of Johnson, verified by Charles Franklin (which petition refers to the orders entered by Judge Manton in the American Brake Shoe case continuing the receivership of Interborough and Manhattan), Judge Bondy entered the second *ex parte* order to show cause in this suit re-
1715 turnable October 4, 1932. On October 3, 1932, a substantially similar order to show cause was entered *ex parte* by Judge Woolsey, returnable October 4, 1932, upon a substantially similar petition and bill of the intervenor, Lillian Boehm, appearing by Boehm & Zeigler, Louis Boehm of Counsel.

From a reading of the bill in the Barber proceedings and the bill in the Johnson proceedings, it appears that many of the same allegations are contained in both bills. Both those bills ask for the appointment of a receiver of Manhattan Railway Company.

J. Osgood Nichols.

1716 Sworn to before me this )
5th day of October, 1932. )

(NOTARIAL STAMP AND SEAL)

## EXHIBIT A TO AFFIDAVIT OF J. OSGOOD NICHOLS. 17

This exhibit consists of part of the printed record in The American Brake Shoe & Foundry Company against Interborough Rapid Transit Company and is printed at pages 153 to 228 and 231 to 519 of this transcript of record.

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## EXHIBIT B TO AFFIDAVIT OF J. OSGOOD NICHOLS.

Doc. 1

### Bill of Complaint (Ancillary Suit).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF NEW YORK.

1721

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity No. 6551 |

*To the Judges of the District Court of the United States for the Eastern District of New York:*

1722 The complainant, The American Brake Shoe and Foundry Company, a corporation duly organized and existing under the laws of the State of Delaware, and a citizen of said State, brings this, its bill of complaint, on its behalf and on behalf of all other creditors of the Interborough Rapid Transit Company, the defendant, who may hereafter join in the prosecution of this suit, against the Interborough Rapid Transit Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and a citizen of said State, and thereupon complainant alleges as follows:

*Exhibit B to Affidavit of J. Osgood Nichols.* 17

FIRST: The complainant, The American Brake Shoe and Foundry Company is a corporation duly organized and existing under the laws of the State of Delaware, and a citizen and resident of said State.

SECOND: On information and belief, that the defendant was at all times hereafter mentioned, and is now, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and a citizen of said State, having its principal office in the City of New York.

THIRD: That this is a suit of a civil nature in equity; that the matter in dispute exceeds the sum of $5,000, exclusive of interest and costs, and is between citizens of different States. 172

FOURTH: On the 26th day of August, 1932, a bill of complaint was duly filed in the District Court of the United States for the Southern District of New York by The American Brake Shoe and Foundry Company, as Complainant, against Interborough Rapid Transit Company, as Defendant, which prayed, among other things, that a receiver or receivers be appointed of all and singular the property and assets of any and every nature and wheresoever situated of the said defendant company; and plaintiff respectfully refers to said bill of complaint, a copy of which is attached hereto, marked "Exhibit A" and made a part hereof, for a more particular statement of the assets and of the business and purposes thereof, and the capitalization of the defendant company, the allegations of which bill are hereby repeated and adopted as though the same were fully repeated and set forth herein. 1725

FIFTH: On August 26, 1932, upon such bill of complaint and an answer interposed by the defendant company, a copy of which is hereto attached, marked "Exhibit B" and by this reference thereto made a part hereof, Victor J. Dowling and Thomas E. Murray, Jr., were duly appointed as Receivers of the assets, estate and effects of the Interborough Rapid Transit Company, defendant in such cause, by an order, a copy of which is hereto attached, marked

1726 *Exhibit B to Affidavit of J. Osgood Nichols.*

"Exhibit C," and by this reference thereto made a part hereof, duly entered in said cause, and Thomas E. Murray, Jr., has duly filed the bond as directed by said order and has thus duly qualified as Receiver in said cause.

SIXTH: Many miles of the defendant's rapid transit railroad system run through territory which is within the territorial jurisdiction of this Court, and defendant has other property and assets of substantial value within the territorial jurisdiction of this Court.

SEVENTH: Because of the foregoing, it is necessary that an ancillary receiver or receivers be appointed in this district and by this Court in aid of the jurisdiction of the
1727 United States District Court for the Southern District of New York.

WHEREFORE, the plaintiff prays:

1. That the rights of the plaintiff and of all creditors of the defendant may be ascertained and decreed and that the Court will fully administer the fund in which the complainant is interested, constituting the railroad systems and other assets of the defendant situated in the territorial jurisdiction of this Court and will for such purpose marshal and administer all of such assets of the defendant and ascertain the several and respective liens and priorities existing thereon, and enforce by decree the rights, liens and equities of the creditors of the defendant, as the
1728 same may be finally ascertained and decreed by the Court.

2. That pending such marshalling and administration and final decrees, for the purpose of preserving intact such property and assets of the defendant, an ancillary receiver or receivers may be appointed for the defendant and of all the property and assets of the defendant, real, personal and mixed, of whatsoever kind and description, situated in the territorial jurisdiction of this Court, including all railroads, leased or operated, tracks and terminal facilities, rolling stock, franchises, leases, contracts, certificates, rights and properties, with full power to sue for, collect,

receive and take into his possession, goods, chattels, credits, rights, moneys, effects, lands, tenements, books, papers and property and assets of every description of the defendant situated in the territorial jurisdiction of this Court, and with all the incidental powers ordinarily vested in ancillary receivers in like cases and with full power and authority to operate the railroads, property and assets of the defendant situated in the territorial jurisdiction of this Court, and to collect and receive all the rents, issues and profits and income thereof, and to apply the same under the orders or decrees of this Court for such period as the Court shall order, to protect and preserve the corporate franchises, privileges and property and to preserve the corporate existence of the defendant and to protect and preserve the said railroads, property and assets situated in the territorial jurisdiction of this Court from being sacrificed under any proceedings which can or may be taken, liable to prejudice or sacrifice the same, and to do any and all acts and things which may be necessary to preserve the valuable rights, contracts and franchises of the defendant or otherwise requisite or proper.

3. That temporarily and pending this suit an injunction may issue against the defendant and all persons claiming and acting by, through and under it, and all other persons, to restrain them from interfering with said ancillary receiver or receivers taking possession of said property, and that plaintiff may have such further relief in the premises as the nature of the case may require and as may be agreeable to equity.

4. That at such time as may be found just and proper the assets and properties of the defendant situated in the territorial jurisdiction of this Court, may be ordered to be sold in whole or in part, and in such manner and upon such terms and conditions as this Court shall deem just and equitable, and that any such order of sale shall make proper and suitable provision for the preservation of all equities, rights, priorities, claims and liens of the creditors

1732 *Exhibit A to Affidavit of J. Osgood Nichols.*

of the defendant and shall provide for the sale of such properties and assets of said defendant, subject to or free and clear from any and all liens and encumbrances in whole or in part, in such manner and upon such terms as this Court may direct, and that the proceeds of any such sale be distributed among those entitled thereto, as this Court shall adjudicate, or that such properties of said defendant may be returned to it, and that the complainant may have such other, further and different relief in the premises as to this Court may seem proper and as may be necessary fully to protect and enforce the rights and equities of the complainant and of all the creditors
1733 and stockholders of the defendant.

5. That the defendant be required to answer all and singular the matters above stated but not under oath, answer under oath being hereby expressly waived.

6. That a writ of subpoena may be granted to the complainant to be directed to the defendant thereby requiring said defendant personally to be and appear on a certain day before the Court and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and further to perform and abide by such further order, direction or decree therefor, as to the Court shall seem meet.

1734 7. That plaintiff have such further and other relief as the Court may deem proper and equitable.

Dated, August 26, 1932.

THE AMERICAN BRAKE SHOE & FOUNDRY COMPANY,
by F. H. JANKE,
Assistant Treasurer,
Complainant.

BREED, ABBOTT & MORGAN,
Solicitors for Plaintiff,
MATHIAS PLUM, JR.,
Of Counsel.

*Exhibit B to Affidavit of J. Osgood Nichols.*

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

FRANK H. JANKE, being duly sworn, deposes and says: that he is the Assistant Treasurer of The American Brake Shoe and Foundry Company, the complainant named in the foregoing bill of complaint; that he makes this affidavit for and in its behalf and is duly authorized to do so; that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true; that the sources of deponent's knowledge and the grounds of his belief as to all matters not stated upon plaintiff's own knowledge are as follows: deponent has made inquiries concerning the present condition of the defendant Interborough Rapid Transit Company, and from such inquiries has obtained the information concerning the facts alleged in said bill of complaint upon information and belief.

FRANK H. JANKE.

Subscribed and sworn to before me
this 26 day of August, 1932.

WILLIAM C. BREED, JR.,
Notary Public,
New York County.
N. Y. Co. Clks. No. 436, Reg. No. 43650.
Commission expires March 30, 1934.

1738 *Exhibit B to Affidavit of J. Osgood Nichols.*

## Exhibits Annexed to Bill of Complaint (Ancillary Suit).

Exhibits A, B and C to the Bill of Complaint were the Bill of Complaint, Answer and the Order of Judge Manton appointing Temporary Receivers in the American Brake Shoe Case in the Southern District of New York, which documents by consent of the parties are printed at pages 153-176, inclusive, and 180-184, inclusive, respectively, of this Transcript of Record.

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*Exhibit B to Affidavit of J. Osgood Nichols.*

Doc. 2.

## Answer (Ancillary Suit).

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity No. 6551 |

Interborough Rapid Transit Company, the defendant in this cause, for answer to the bill of complaint herein, or unto so much and such parts thereof as the defendant is advised it is necessary or material for this defendant to make answer, answering, says:

FIRST: The defendant admits all the allegations of said bill of complaint.

SECOND: The defendant, reiterating the admissions of the preceding paragraph "First" of this answer, joins in the prayer of said bill of complaint and prays that this Court, sitting in equity, may take possession of the railroad system of the defendant and of all the property and assets of the defendant situated in the territorial jurisdiction of this Court through the appointment of an ancillary Receiver or Receivers as prayed in said bill of complaint and thereby protect and preserve the corporate

1744 *Exhibit B to Affidavit of J. Osgood Nichols.*

franchises, privileges, property and assets and preserve the corporate existence of the defendant and protect and preserve its said system and its said property, real and personal, from being sacrificed under any proceedings which can or may be taken, liable to prejudice or sacrifice the same, and do any and all acts which may be necessary to preserve the valuable rights, contracts, franchises, property and assets of the defendant situated in the territorial jurisdiction of this Court; and the defendant accordingly prays that, inasmuch as there is no adequate remedy at law in the premises for the plaintiff or for this defendant, this Court will, for the purposes aforesaid, appoint an
1745 ancillary Receiver or Receivers as prayed for in said complaint, and empower and authorize such ancillary Receiver or Receivers to take possession of the entire property and assets of this defendant situated in the territorial jurisdiction of this Court, and to preserve, manage, operate and control the same, and otherwise discharge all the duties ordinarily imposed by courts upon ancillary Receivers in similar cases; and that this Court will direct all persons in possession of said property and assets of this defendant, or any part thereof, to surrender the same to such ancillary Receiver or Receivers or to hold such property and assets as such ancillary Receiver or Receivers may direct.

JAMES L. QUACKENBUSH,
1746 Solicitor for Interborough Rapid
Transit Company, Defendant,
Office and P. O. Address,
165 Broadway,
Borough of Manhattan,
City of New York, N. Y.

*Exhibit B to Affidavit of J. Osgood Nichols.*

Doc. 3.

## Order Appointing Receivers (Ancillary Suit).

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity No. 6551 |

This cause came on to be heard at this term upon the bill of complaint, the exhibits thereto attached and on the answer of the defendant thereto this day filed, and thereupon upon consideration thereof, and after due deliberation, the Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED, that Victor J. Dowling, of the City of New York, and Thomas E. Murray, Jr., of the City of New York, be and they hereby are appointed temporary ancillary Receivers of the defendant, Interborough Rapid Transit Company, and of all the property and assets of the said defendant, real, personal and mixed, of whatsoever kind and description, situated in the territorial jurisdiction of this Court, including all railroads, owned, leased or operated by said defendant, all tracks, terminal facilities, offices, shops and all buildings and appurtenances of every kind, all cars and other rolling

stock and equipment, tools, machinery, furniture, fixtures, materials and supplies, books of account, records and other books, papers and accounts, cash in bank, on deposit and in hand, money, debts, things in action, credits, stocks, bonds, evidences of indebtedness, securities, deeds, leases, contracts, muniments of title, bills receivable, rents, issues, profits and income accruing and to accrue as well as all interest, easements, privileges and franchises and all assets of every kind, character and description of the defendant herein situated in the territorial jurisdiction of this Court; that the said ancillary Receivers be and they hereby are authorized immediately to take possession of the same and to run, manage and operate the said railroads, properties and assets in such manner as will in their judgment produce most satisfactory results so that the operation of the railroad system of the defendant shall be continued in the same manner as at present and the public duties obligatory upon the defendant be in all respects discharged, and to exercise the authority and franchises of defendant and discharge its public duties and to preserve and protect its said system, properties and assets in proper condition and repair and to protect the title and possession and secure and develop the business of the same, and in their discretion to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees, and to make such payments and disbursements as may be needful and proper in so doing; that the said ancillary Receivers be and they hereby are authorized to collect and receive the rents, income, tolls and profits of the said railroads, properties and assets, and to make appropriate payments therefrom on account of accruing rents and other necessary charges, and they shall have power to redeem any and all securities of the defendant now pledged as security on loans of money, and shall have power to borrow money if needful in their judgment in order to comply with this direction, and also, so far as may be needful, to meet current re-

quirements for labor, materials and supplies, but for no other purpose without the further order of this Court; and the said ancillary Receivers are hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in their judgment for the proper protection of the property and trust hereby reposed in them and likewise to defend all actions instituted against them as ancillary Receivers, and also to appear in and conduct the prosecution or defense of any suits now pending in any court against the defendant, the prosecution and defense of which will in the judgment of said ancillary Receivers be necessary for the proper protection of the property placed in their charge, or the interests and rights of creditors connected therewith; and the said ancillary Receivers are hereby authorized in their discretion from time to time, out of the funds coming into their hands, to pay the expenses of operating the said properties and executing their trusts, and all taxes and assessments upon the said properties or any part thereof, and all such rentals and instalments as may fall or become due for the use of any portion of said railroads and other property; and also to pay and discharge all claims arising from the previous operation of said properties as in their judgment on examination are proper to be paid as expenses of operation, and also to pay the current and unpaid payrolls (especially any and all outstanding checks, drafts or orders for the payment of wages or salaries of employees of defendant for work done or services rendered prior to the date of this order), and vouchers and supply accounts incurred in the operation of said railroads system at any time within four months prior hereto. The said ancillary Receivers are hereby required to open proper books of account, wherein shall be stated the earnings, expenses, receipts and disbursements of their said trust, and preserve proper vouchers for all payments by them made on account thereof;

1756 *Exhibit B to Affidavit of J. Osgood Nichols.*

And it is further ordered that the bonds of the said ancillary Receivers in the sum of Fifty thousand 00/100 Dollars each, conditioned that they will well and truly perform the duties of their office and duly account for all moneys or property which may come into their hands, and abide by and perform all things which they shall be directed to do, with sufficient sureties to be approved of by a judge of this Court, be filed in the office of the Clerk of this Court;

And it is further ordered that the defendant, said Interborough Rapid Transit Company, and each and every of its officers, directors, agents and employees and all other
1757 persons whomsoever, be and they are hereby required and commanded forthwith, upon demand of the said ancillary Receivers, or their duly authorized agent, to turn over and deliver to said ancillary Receivers, or their duly constituted representatives, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys or other property in his or their hands or under his or their control situated in the territorial jurisdiction of this Court, and each of said directors, officers, agents and employees is hereby commanded and required to obey and perform such orders as may be given to them from time to time by the said ancillary Receivers, or their duly constituted representatives, in conducting the operation of the said system, properties and assets, and in dis-
1758 charging their duties as ancillary Receivers;

And the defendant, said Interborough Rapid Transit Company, and its officers, directors, agents and employees, and all other persons claiming to act by, through or under the defendant and all other persons whomsoever are hereby enjoined from interfering in any way whatever with the possession or management of any part of the property over which the ancillary Receivers are hereby appointed or interfering in any way to prevent the discharge of their

duties or their operation of the same, and any party in interest may apply for further direction;

And it is further ordered that any applications or petitions for orders or instructions or otherwise in this cause shall be made to the undersigned in chambers or otherwise, the undersigned hereby reserving full right and jurisdiction over this cause and any and all proceedings therein;

And it is further ordered that if either of said ancillary Receivers shall qualify by giving his bond before the other of such ancillary Receivers has so qualified, the said ancillary Receiver so first qualifying shall, until the other of such ancillary Receivers has so qualified, exercise any or all the powers, by this order or subsequent orders entered herein, conferred upon said ancillary Receivers;

And it is further ordered that if at any time either of said ancillary Receivers shall, because of absence from the United States or otherwise, be unable to act, the other of such ancillary Receivers may in such event exercise any or all the powers, by this order or subsequent orders entered herein, conferred upon said ancillary Receivers;

And it is further ordered that if and when the Temporary receivership in the aforesaid proceedings in the United States District Court for the Southern District of New York is made permanent by said Court, pursuant to the order of the said Court appointing temporary Receivers, a copy of which is attached to the bill of complaint filed herein, then the receivership herein shall be made permanent.

Dated, New York, August 26, 1932.

MARCUS B. CAMPBELL,
*United States District Judge.*

1762 *Exhibit B to Affidavit of J. Osgood Nichols.*

Doc. 4
Order 2

## Order Appointing Receivers' Counsel (Ancillary Suit).

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, | ORDER |
| against | In Equity No. 6551 |
| INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | |

1763

This cause coming on to be heard upon the petition of Thomas E. Murray, Jr., one of the ancillary Receivers herein, acting for and on behalf of both ancillary Receivers appointed herein, for leave to employ solicitors and general counsel for said ancillary Receivers, and upon the annexed affidavit of Henry J. Wolff, and it appearing to the Court from such petition that numerous and intri-
1764 cate legal questions will be presented in the administration of said ancillary receivership, and that it is necessary for said ancillary Receivers to employ solicitors and general counsel to aid them in said administration, and it appearing from such petition and the affidavit of Henry J. Wolff that Chadbourne, Stanchfield & Levy, practicing attorneys and members of the Bar of the State of New York, 25 Broadway, Borough of Manhattan, City of New York, are competent to act as solicitors and general counsel for said ancillary Receivers, and for the special reasons

set forth in such petition and affidavit are not disqualified, because of any adverse interest or otherwise, it is therefore

ORDERED that leave be, and it is hereby, granted to said Receivers to retain said Chadbourne, Stanchfield & Levy as solicitors and general counsel for the ancillary Receivers in the above entitled cause; and it is further

ORDERED that said Chadbourne, Stanchfield & Levy be, and they are hereby, appointed the solicitors and general counsel for said ancillary Receivers.

Dated, Brooklyn, N. Y., August 29th, 1932.

MARCUS B. CAMPBELL,
*U. S. D. J.*

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Doc. 5.

**Receivers' Application No. 1 (Ancillary Suit).**

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity No. 6551 RECEIVERS' PETITION |

The petition of Thomas E. Murray, Jr., ancillary Receiver herein, acting on behalf of and for both ancillary

1768 *Exhibit B to Affidavit of J. Osgood Nichols.*

Receivers, duly appointed by an order of this Court, dated August 26, 1932, upon information and belief, respectfully shows to this Court as follows:

1. On August 26, 1932, by an order of this Court, your petitioner and Victor J. Dowling were duly appointed ancillary Receivers herein, and your petitioner has duly executed and filed the bond required by the terms of said order, and is now acting as such ancillary Receiver.

2. Your petitioner realizes that the duties of the ancillary Receivers are complicated, and that there are many intricate legal questions which will arise in the conduct
1769 of such duties, and it is therefore imperative that your ancillary Receivers be allowed to employ solicitors and general counsel to represent them and advise them in their discharge of such duties, in order that they may properly administer their trust.

3. Your petitioner deems the firm of Chadbourne, Stanchfield & Levy, practicing attorneys and members of the Bar of the State of New York, at No. 25 Broadway, Borough of Manhattan, City of New York, to be competent and qualified to represent them as their solicitors and general counsel in the administration of said trust for the following reasons:

Several members of the firm of Chadbourne, Stanchfield
1770 & Levy have had previous contact with the legal problems pertaining to traction matters both in New York City and Chicago, Illinois.

Furthermore, said firm has an extensive practice in equity receivership matters.

4. Attached hereto, marked "Exhibit 1," are copies of the petition and affidavits filed in the receivership proceedings pending in the United States District Court for the Southern District of New York and referred to in the

bill of complaint filed hereon on August 26, 1932, asking for leave to the Receivers appointed in said proceedings to employ as their solicitors and general counsel the firm of Chadbourne, Stanchfield & Levy, and attached hereto, marked "Exhibit 2," is a copy of the order of the United States District Court for the Southern District of New York entered pursuant to said petition and granting leave to said Receivers to employ the firm of Chadbourne, Stanchfield & Levy as their solicitors and general counsel in said proceedings pending in the United States District Court for the Southern District of New York.

WHEREFORE, your petitioner prays that an order be entered herein granting leave to your ancillary Receivers to employ said firm of Chadbourne, Stanchfield & Levy to be solicitors and general counsel for them as such ancillary Receivers in this cause.

Dated, August 27th, 1932.

THOMAS E. MURRAY, JR.,
Receiver, acting on behalf of and for
both the Receivers.

1774 *Exhibit B to Affidavit of J. Osgood Nichols.*

**Exhibit I to Doc. 5 (Ancillary Suit).**

RECEIVER'S APPLICATION No. 1.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 RECEIVERS' PETITION. |

1775

The petition of THOMAS E. MURRAY, JR., Receiver herein, acting on behalf of and for both Receivers, duly appointed by an order of this Court, dated August 26, 1932, upon information and belief, respectfully shows to this Court as follows:

1. On August 26, 1932, by an order of this Court, your petitioner and Victor J. Dowling were duly appointed Receivers herein, and your petitioner has duly executed and filed the bond required by the terms of said order, and is now acting as such Receiver.

1776

2. Your petitioner realizes that the duties of the Receivers are complicated, and that there are many intricate legal questions which will arise in the conduct of such duties, and it is therefore imperative that your Receivers be allowed to employ solicitors and general counsel to represent them and advise them in their discharge of such

duties, in order that they may properly administer their trust.

3. Your petitioner deems the firm of Chadbourne, Stanchfield & Levy, practicing attorneys and members of the bar of the State of New York, at No. 25 Broadway, Borough of Manhattan, City of New York, to be competent and qualified to represent them as their solicitors and general counsel in the administration of said trust for the following reasons:

Several members of the firm of Chadbourne, Stanchfield & Levy have had previous contact with the legal problems pertaining to traction matters both in New York City and Chicago, Illinois.

Furthermore, said firm has an extensive practice of equity receivership matters.

4. Your petitioner has been requested by the firm of Root, Clark & Buckner, counsel for the Committee for the Ten-Year Six Per Cent Gold Notes of Interborough Rapid Transit Company, to retain said firm of Chadbourne, Stanchfield & Levy as the solicitors and general counsel for the Receivers in this cause, and your petitioner is of the belief that, because of the reasons above set forth, it is advisable to accept such suggestion.

WHEREFORE, your petitioner prays that an order be entered herein granting leave to your Receivers to employ said firm of Chadbourne, Stanchfield & Levy to be solicitors and general counsel for them as such Receivers in this cause.

Dated, New York, N. Y., August 26, 1932.

THOMAS E. MURRAY, JR.,
Receiver, Acting on behalf of and
for Both the Receivers.

1780 *Exhibit B to Affidavit of J. Osgood Nichols.*

**Exhibit 2 to Doc. 5. (Ancillary Suit).**

ORDER APPOINTING RECEIVERS' COUNSEL.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity E 70-364 ORDER |

1781

This cause coming on to be heard upon the petition of THOMAS E. MURRAY, JR., Receiver herein, acting for and on behalf of both Receivers appointed herein, for leave to employ solicitors and general counsel for said Receivers, and upon the annexed affidavit of Thomas L. Chadbourne, and it appearing to the Court from such petition that numerous and intricate legal questions will be presented in the administration of said receivership, and that it is necessary for said Receivers to employ solicitors and general counsel to aid them in said administration, and it appearing from such petition and the affidavit of Thomas L. Chadbourne that Chadbourne, Stanchfield & Levy, practicing attorneys and members of the Bar of the State of New York, 25 Broadway, Borough of Manhattan, City of New York, are competent to act as solicitors and general counsel for said Receivers and for the special reasons set forth in such petition and affidavit are not disqualified, because of any adverse interest, it is therefore

1782

*Exhibit B to Affidavit of J. Osgood Nichols.* 17

ORDERED that leave be, and it is hereby, granted to said Receivers to retain said Chadbourne, Stanchfield & Levy as solicitors and general counsel for the Receivers in the above-entitled cause; and it is further

ORDERED that said Chadbourne, Stanchfield & Levy be, and they are hereby, appointed the solicitors and general counsel for said Receivers.

Dated, New York, N. Y., August 26, 1932.

MARTIN T. MANTON,
*U. S. Circuit Judge designated to hold a term of the District Court for Southern District of New York.* 178

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Doc. 5

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | | |
|---|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | AFFIDAVIT | 1785 |

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

THOMAS L. CHADBOURNE, being duly sworn, deposes and says:

1786 *Exhibit B to Affidavit of J. Osgood Nichols.*

1. That he is one of the partners of the firm of Chadbourne, Stanchfield & Levy, practicing attorneys and members of the Bar of the State of New York, of 25 Broadway, Borough of Manhattan, City of New York.

2. That several members of the firm of Chadbourne, Stanchfield & Levy have had contact in the intricate and numerous legal problems in connection with traction matters, both in the City of New York and in the City of Chicago, Illinois. Furthermore, the firm of Chadbourne, Stanchfield & Levy has an extensive practice in connection with equity receivership causes.

1787 3. That such firm was appointed counsel for the Committee for the Ten-Year Six Per Cent. Gold Notes of Interborough Rapid Transit Company on or about July 18, 1932, but such firm has, prior to the institution of this cause, resigned as counsel for such Committee. Such firm has acted on some occasions as attorneys for the firm of Hayden, Stone & Co. and for some members of Hayden, Stone & Co. Your deponent believes that the firm of Hayden, Stone & Co. and possibly some members of such firm may be interested in securities of Interborough Rapid Transit Company. However, the firm of Chadbourne, Stanchfield & Levy does not and will not represent any creditor of Interborough Rapid Transit Company or any other person interested in the above cause or in the re-
1788 ceivership estate.

4. Such firm of Chadbourne, Stanchfield & Levy has not at any time been counsel for Interborough Rapid Transit Company. Said firm neither have nor represent nor does any member or associate of said firm have or represent any interest adverse to Interborough Rapid Transit Company or the Receivers of Interborough Rapid

*Exhibit B to Affidavit of J. Osgood Nichols.*

Transit Company appointed by order of this Court entered August 26, 1932.

THOMAS L. CHADBOURNE.

Sworn to before me this
26 day of August, 1932.

ARTHUR E. PEACOCK,
Notary Public,
Queens County.
Certificate filed in New York County No. 300.

1792 *Exhibit B to Affidavit of J. Osgood Nichols.*

Doc. 5

**Affidavit of Receivers' Counsel (Ancillary Suit).**

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
1793 Complainant,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

AFFIDAVIT

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

HENRY J. WOLFF, being duly sworn, deposes and says:

1. That he is one of the partners of the firm of Chadbourne, Stanchfield & Levy, practicing attorneys and members of the Bar of the State of New York, of 25 Broadway,
1794 Borough of Manhattan, City of New York.

2. That several members of the firm of Chadbourne, Stanchfield & Levy have had contact with the intricate and numerous legal problems in connection with traction matters, both in the City of New York and in the City of Chicago, Illinois. Furthermore, the firm of Chadbourne, Stanchfield & Levy has an extensive practice in connection with equity receivership causes.

*Exhibit B to Affidavit of J. Osgood Nichols.* 17

3. That such firm was appointed counsel for the Committee for the Ten-Year Six Per Cent. Gold Notes of Interborough Rapid Transit Company on or about July 18, 1932, but such firm has, prior to the institution of this cause, resigned as counsel for such Committee. Such firm has acted on some occasions as attorneys for the firm of Hayden, Stone & Co. and for some members of Hayden, Stone & Co. Your deponent believes that the firm of Hayden, Stone & Co. and possibly some members of such firm may be interested in securities of Interborough Rapid Transit Company. However, the firm of Chadbourne, Stanchfield & Levy does not now and will not represent any creditor of Interborough Rapid Transit Company or any other person interested in the above cause or in the receivership estate. 179

4. Such firm of Chadbourne, Stanchfield & Levy has not at any time been counsel for Interborough Rapid Transit Company. Said firm neither have nor represent, nor does any member or associate of said firm have or represent any interest adverse to Interborough Rapid Transit Company or the Ancillary Receivers of Interborough Rapid Transit Company appointed by order of this Court entered August 26, 1932.

HENRY J. WOLFF.

Sworn to before me this
26th day of August, 1932. 1797

JACOB S. FUCHS,
Notary Public,
(Seal) Bronx Co. #61F33.
Cert. filed in N. Y. Co.
Comm. expires March 30, 1933.

1798 *Exhibit B to Affidavit of J. Osgood Nichols.*

Doc. 6

**Consent and Waiver of Notice as to Appointment of Receivers' Counsel (Ancillary Suit).**

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

1799

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

WAIVER OF CONSENT AND NOTICE

We hereby waive notice of the within petition and consent to the granting and entering of the attached order authorizing the Receivers herein to employ as their solicitors and general counsel herein the firm of Chadbourne, Stanchfield & Levy.

1800 Dated, New York, N. Y., August 27th, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

JAMES L. QUACKENBUSH,
Attorney for Defendant.

*Exhibit B to Affidavit of J. Osgood Nichols.* 180

Doc. 7
Order 3

**Petition and Order Authorizing Ancillary Receivers to Number Documents and Papers.**

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity No. 6551 ORDER |

This cause coming on to be heard upon the petition of Victor J. Dowling and Thomas E. Murray, Jr., the ancillary Receivers herein, and upon the consent thereto of the attorneys for the complainant and the attorney for the defendant, and upon consideration thereof, and after due deliberation, the Court being fully advised in the premises, it is

ORDERED, ADJUDGED AND DECREED that the ancillary Receivers be and they hereby are authorized and permitted to cause all of the documents and papers to be filed in the proceedings in this cause to be numbered, and that any parties in these proceedings may refer by such number to any of such documents and papers in any subsequent proceedings in this cause.

Dated, Brooklyn, N. Y., September 21st, 1932.

MARCUS B. CAMPBELL,
*U. S. District Judge.*

1804 *Exhibit B to Affidavit of J. Osgood Nichols.*

Doc. 7

## Ancillary Receivers' Application No. 2.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,

1805

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

In Equity No. 6551

RECEIVERS' PETITION

*To the Honorable Judges of the District Court of the United States for the Eastern District of New York:*

The petition of Victor J. Dowling and Thomas E. Murray, Jr., ancillary Receivers herein, upon information and belief respectfully shows to this Court as follows:

1. That in the administration of this estate numerous
1806 proceedings will be necessary, involving the filing of many papers and documents.

2. That in order that your ancillary Receivers may be able to maintain an orderly and careful record of all proceedings in this cause and of all documents and papers to be filed in connection with the administration of the estate, your petitioners desire to number the various ancillary Receivers' petitions and orders which may be entered by this Court and any other documents or papers which may

be filed herein, and to refer in any subsequent papers or documents to such previous papers by the numbers contained on such documents and papers.

WHEREFORE, your petitioners pray that an order be made by this Court authorizing and permitting the ancillary Receivers to number the various documents and papers filed in this cause, and that any parties in these proceedings may refer to such documents and papers by the numbers contained thereon.

Dated, Brooklyn, N. Y., September 8, 1932.

VICTOR J. DOWLING, 180
THOMAS E. MURRAY, JR.,
Ancillary Receivers.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for said Ancillary Receivers,
Office and P. O. Address,
No. 25 Broadway,
Borough of Manhattan,
New York, N. Y.

WM. WALLACE,
of Counsel.

1810 *Exhibit B to Affidavit of J. Osgood Nichols.*

Doc. 7

**Waiver and Consent.**

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, | In Equity No. 6551 |
| 1811 against | WAIVER OF NOTICE AND CONSENT |
| INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | |

We hereby waive notice of the within petition and consent to the granting and entering of the attached order.

Dated, New York, N. Y., September 9, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

1812

JAMES L. QUACKENBUSH,
Attorney for Defendant.

*Exhibit B to Affidavit of J. Osgood Nichols.* 18

Doc. 8
Order 4

**Petition and Order Authorizing Ancillary Receivers to Maintain a Printed Record of All Documents.**

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Complainant,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Defendant.

In Equity No. 6551 181

ORDER

This cause coming on to be heard upon the petition of Victor J. Dowling and Thomas E. Murray, Jr., ancillary Receivers herein, and upon the consent thereto of the attorneys for the complainant and the attorney for the defendant, and upon consideration thereof, and after due deliberation, the Court being fully advised in the premises, and it appearing to the Court that the entry of this order will facilitate and further the orderly and careful administration of the estate, it is therefore 1815

ORDERED, ADJUDGED AND DECREED that leave be and it is hereby granted to said ancillary Receivers to maintain a printed record of all documents arising in the proceedings in this cause and of any further documents and papers which in the discretion of the ancillary Receivers should be so printed.

Dated, Brooklyn, N. Y., September 21st, 1932.

MARCUS B. CAMPBELL,
*U. S. District Judge.*

1816 *Exhibit B to Affidavit of J. Osgood Nichols.*

Doc. 8

**Ancillary Receivers' Application No. 3.**

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity No. 6551 RECEIVERS' PETITION |

1817

*To the Honorable Judges of the District Court of the United States for the Eastern District of New York:*

The petition of Victor J. Dowling and Thomas E. Murray, Jr., ancillary Receivers herein, upon information and belief respectfully shows to this Court as follows:

1. That in the administration of this estate numerous proceedings will be necessary, involving records of considerable length and detail.

1818

2. That in order that your ancillary Receivers may be able to maintain an orderly and careful record of all proceedings in this cause and of all documents and papers arising in the administration of the estate, your petitioners desire to cause to be printed all such records filed in said proceedings and any further documents and papers which your ancillary Receivers in their discretion desire to have so printed.

WHEREFORE, your petitioners pray that an order be made by this Court authorizing the ancillary Receivers to main-

tain a printed record of all documents arising in the proceedings in this cause and of any further documents and papers which your ancillary Receivers in their discretion desire to have so printed.

Dated, Brooklyn, N. Y., September 8, 1932.

VICTOR J. DOWLING,
THOMAS E. MURRAY, JR.,
Ancillary Receivers.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for said Ancillary Receivers,
Office and P. O. Address,
No. 25 Broadway,
Borough of Manhattan,
New York, N. Y.

WM. WALLACE,
of Counsel.

1822 *Exhibit B to Affidavit of J. Osgood Nichols.*

Doc. 8

**Waiver and Consent.**

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, | In Equity No. 6551 |
| 1823 against | |
| INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | WAIVER OF NOTICE AND CONSENT |

We hereby waive notice of the within petition and consent to the granting and entering of the attached order.

Dated, New York, N. Y., September 9, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

JAMES L. QUACKENBUSH,
1824 Attorney for Defendant.

*Exhibit B to Affidavit of J. Osgood Nichols.* 18

Doc. 9
Order 5

## Petition and Order Authorizing Ancillary Receivers to Pay Expenses for Registration and Transfer of Stock of Interborough Rapid Transit Company.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

182

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity No. 6551 ORDER |

This cause coming on to be heard upon the petition of Victor J. Dowling and Thomas E. Murray, Jr., ancillary Receivers herein, and upon the consent thereto of the attorneys for the complainant and the attorney for the defendant, and upon consideration thereof, and after due deliberation, the Court being fully advised in the premises, and it appearing to the Court that the entry of this order will facilitate and further the orderly and careful administration of the estate, it is therefore 1827

ORDERED, ADJUDGED AND DECREED that, until the Court shall otherwise direct, the ancillary Receivers be and they hereby are authorized to pay, out of funds coming into their hands as ancillary Receivers, such expenses as they

1828 *Exhibit B to Affidavit of J. Osgood Nichols.*

shall deem necessary or proper for the registration and transfer of the outstanding shares of stock of Interborough Rapid Transit Company.

Dated, Brooklyn, N. Y., September 21st, 1932.

MARCUS B. CAMPBELL,
*U. S. District Judge.*

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Doc. 9

**Ancillary Receivers' Application No. 4.**

1829

September 8, 1932.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against | In Equity No. 6551 |
| 1830 INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | RECEIVERS' PETITION |

*To the Honorable Judges of the District Court of the United States for the Eastern District of New York:*

The petition of Victor J. Dowling and Thomas E. Murray, Jr., ancillary Receivers herein, upon information and belief respectfully shows to this Court as follows:

*Exhibit B to Affidavit of J. Osgood Nichols.*

1. That the appointment of your petitioners as ancillary Receivers of the defendant company has necessarily left it without any cash resources with which to pay the ordinary and necessary current expenses for the registration and transfer of its outstanding shares of stock.

2. That your petitioners are of the opinion that it is desirable that the ancillary Receivers herein be authorized to pay, out of funds coming into their hands as ancillary Receivers, such expenses.

WHEREFORE, your petitioners pray for an order authorizing the ancillary Receivers to pay, out of funds coming into their hands as ancillary Receivers, all expenses necessary or proper to provide for the registration and transfer of the outstanding shares of stock of Interborough Rapid Transit Company.

Dated, Brooklyn, N. Y., September 8, 1932.

VICTOR J. DOWLING,
THOMAS E. MURRAY,
Ancillary Receivers.

CHADBOURNE, STANCHFIELD & LEVY,
Solicitors for said Ancillary Receivers,
Office and P. O. Address,
No. 25 Broadway,
Borough of Manhattan,
New York, N. Y.

WM. WALLACE,
of Counsel.

1834 *Exhibit B to Affidavit of J. Osgood Nichols.*

Doc. 9

**Waiver and Consent.**

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | In Equity No. 6551 WAIVER OF NOTICE AND CONSENT |

1835

We hereby waive notice of the within petition and consent to the granting and entering of the attached order.

Dated, New York, N. Y., September 9, 1932.

BREED, ABBOTT & MORGAN,
Attorneys for Complainant.

1836

JAMES L. QUACKENBUSH,
Attorney for Defendant.

183

## Exhibit C Annexed to Affidavit of J. Osgood Nichols.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HARRY BARBER,
*Complainant,*
*against*

MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as RECEIVERS OF THE INTERBOROUGH RAPID TRANSIT COMPANY, and THE CITY OF NEW YORK,
*Defendants.*

1838

The complainant brings this his bill of complaint against the above-named defendants and respectfully alleges the following:

I. The complainant is a citizen and resident of Boston, in the Commonwealth of Massachusetts, and is 1839
the record holder of twenty (20) shares of the capital stock of the defendant MANHATTAN RAILWAY COMPANY (hereinafter called "Manhattan") having a par value of $2,000. One Arthur Berenson, the holder of 230 shares of the 7% stock of Manhattan of the par value of $23,000 and the holder of $10,000 face value of second mortgage bonds of Manhattan is associated with the plaintiff in this suit, but being a resident of New York cannot become a party plaintiff without destroying the jurisdiction of this court.

The defendants, Manhattan and INTERBOROUGH RAPID TRANSIT COMPANY (hereinafter called "Interborough"),

are street railway corporations, duly organized under the laws of the State of New York, and are citizens of the State of New York. The aforesaid Dowling and Murray are citizens and residents of the State of New York, and were duly appointed temporary receivers of the defendant Interborough by order of this court on August 26, 1932. Application is hereby made to this Honorable Court to join the said Dowling and Murray as Receivers of Interborough as parties defendant in the above entitled cause and for leave to sue Interborough.

II. This action is brought by the complainant in his derivative capacity as a minority stockholder of Manhattan, in his own behalf and in behalf of such other stockholders of Manhattan as may join herein and become parties hereto (by leave of court) for the benefit of Manhattan.

III. The bill of complaint herein brought by the complainant as a stockholder of Manhattan is founded upon rights which may properly be asserted by Manhattan. The complainant was a shareholder of Manhattan at the time of the transactions complained of herein. This suit is not a collusive one to confer on a court of the United States the jurisdiction of a cause of which it would not otherwise have cognizance, and is instituted in good faith for Manhattan's benefit.

IV. Upon information and belief Manhattan was incorporated in the State of New York, November 1, 1875. It owns all of the elevated railroads in the Borough of Manhattan and The Bronx, New York City. The length of its main line and branches is approximately forty-two (42) miles with a track mileage aggregating one hundred and thirty-nine (139) miles.

On January 1, 1903, Manhattan leased its entire properties to Interborough for a period of nine hundred and ninety-nine (999) years, under a written lease, providing among other things as follows:

"Article Sixth.—The Lessee hereby leases and hires from the Lessor the said railroad and railroads, franchises, rights, privileges, easements, real estate and property, hereinbefore mentioned, described and demised, for and during said term of nine hundred and ninety-nine (999) years aforesaid, and upon the terms and conditions in this lease expressed, and the Lessee hereby covenants and agrees to pay to the Lessor and hereby guarantees to each owner of record of shares of capital stock of the Lessor, dividends, as rent, as hereinafter provided, for the term of two years and nine months from the 31st day of March, 1903. The Lessor hereby covenants and agrees that prior to the date of payment of each of the installments of rent provided for in this article, it will declare a dividend equal to such installment, payable upon the date of payment of such installment, and after or simultaneously, with such declaration of dividend, will close the transfer books of stock for a reasonable time prior to such date of payment, and that such dividend shall be payable to the owner of record of its stock, who shall be such, on the day of closing of its transfer books aforesaid. The said dividend rentals payable to all such owners of record for each of the first two years and the remaining nine months comprised in said two years and nine months shall be an amount equal in the aggregate to the net earnings of the Lessor, for each of said three periods respectively, but shall not exceed seven per centum (7%) per annum upon the outstanding capital stock of the Lessor; and shall be not less than six per centum (6%) per annum upon such stock; said net earnings shall among other things, include all interest earned by the Lessor, and shall be ascertained by the system of accounting heretofore employed by the Lessor, and by deducting from the gross earnings, among other things, operating expenses, taxes accrued and proportionately chargeable to the period aforesaid, interest upon the bonds described or mentioned in ARTICLE SEVENTH of this lease; repairs, replacements, expenses of litigation and all judgments recovered, except judgments recovered by owners or parties otherwise interested in property abutting upon the lines of rail- 1844 1845

road of the Lessor, for damages to said abutting property, or the rental value thereof, arising from the construction, maintenance and or operation of the said railroads, and their interference with easements of light, air and access, and the expenses of the Lessor in litigations connected therewith.

Proper books of account according to the system of accounting heretofore employed by the Lessor shall be kept by the Lessee until January first, 1906, showing the gross earnings, and an itemized account of the proper and reasonable charges against the same which shall at all times be open to the inspection of the officers and agents of the Lessor.

1847 No reduction of the guaranteed annual dividend rental or in the term of years of this lease shall be made without the unanimous consent of the shareholders of record of the Lessor, provided, however, that nothing herein contained shall otherwise limit the lawful powers of the Board of Directors and shareholders of the Lessor to deal with the subject-matter of this lease and its provisions.

From and after the expiration of said two years and nine months, and from January first, 1906, the Lessee hereby covenants and agrees to pay to the Lessor, and guarantees to each owner of record of the shares of capital stock of the Lessor, as rent, an annual dividend of seven per centum (7%) on his holding of the capital stock of the Lessor.

1848 The Lessee hereby covenants and agrees, that it will each and every year during the term hereby granted, beginning with the first day of April, 1903, pay to the Lessor as rent for the demised property, and hereby guarantees to the respective owners of record of the shares of the Lessor, the said annual dividends free of all charges, in quarter-yearly payments on the first days of January, April, July and October in each year, which after January 1st, 1906, shall be equal quarterly payments; the first of such payments to be made on the first day of July, 1903; and the Lessee will from time to time execute in proper form a guarantee to the above effect, printed or engraved upon the certificates of stock of the Lessor; and as such stock certificates are surrendered for cancellation and issuance of new certificates in place thereof, will from time to time, upon

request of the holder renew such guarantee upon all such new certificates.

The form of such Guarantee shall be as follows:

"Dividends amounting to six per cent per annum and an additional amount, if earned, not exceeding one per cent. per annum, until January first, 1906, and after that date, dividends amounting to seven (7) per cent. per annum, upon the par value of the outstanding capital stock of the Manhattan Railway Company are guaranteed, and will be paid by the undersigned, in accordance with the terms and provisions of a certain Indenture made between the Manhattan Railway Company 1850
and the undersigned, dated the first day of January, 1903.

INTERBOROUGH RAPID TRANSIT COMPANY;
By

Treasurer."

Payment of dividends as above provided by the Lessee to the stockholders of the Lessor shall constitute payment of rent, in compliance with the foregoing covenants to pay the same to the Lessor.

Article Seventh.—The Lessee hereby assumes and covenants and agrees to pay to the Lessor as rent, as the same respectively becomes due, the interest on the outstanding Debenture Bonds of the 1851
New York Elevated Railroad Company, now merged in and with the Lessor, of which One million dollars ($1,000,000) of principal are now outstanding, and also the interest on the First Mortgage Bonds of the Metropolitan Elevated Railway Company, now merged in and with the Lessor, of which there are outstanding of principal Ten million eight hundred and eighteen thousand dollars ($10,818,000), and also the interest on the Consolidated Mortgage Four Per cent. Bonds of the Lessor, of which there are now outstanding of principal twenty-eight millions and sixty-five thousand dollars ($28,065,000); and also the interest on all bonds that may hereafter be issued by the Lessor in extension of or substitution of or for the purpose of retiring any of the aforesaid or renewal Mortgage Bonds; and also the in-

terest on all the bonds of the Lessor which may hereafter be issued, in pursuance of the terms of the Consolidated Mortgage of the Lessor; and also the interest on all bonds of the Lessor which may hereafter be issued either as an original issue or as extension or renewal bonds, as provided by the terms of this lease; and the Lessee further covenants and agrees to keep the Lessor safe and harmless at all times from all claims and demands against it for interest arising from or under the said bonds, or any of them.

Payment of any of such interest by the Lessee to the bondholders of the Lessor shall constitute pay-
1853 ment of rent, in compliance with the foregoing covenants to pay the same to the Lessor.

The Lessee hereby further covenants and agrees to keep and perform all the conditions, covenants and agreements that may be contained in all or any of the aforesaid mortgages to be kept and performed by the Lessor, except the agreement to pay the principal of the bonds respectively secured thereby.

For all of the payments in this lease provided on the part of the Lessee, well and truly to be made during the term of this lease demised, the said Lessee hereby binds itself and its successor or successors firmly by these presents.

Article Eighth.—The railroads hereby leased
1854 shall be deemed to have been operated from twelve o'clock and one second on the morning of the first day of April in the year One thousand nine hundred and three, by the Lessee, and all such operation from and after that time shall be for the account of the said Lessee; provided, however, to the end that the present plans of improvement and financial administration of the leased property may be completed, the present Vice-President, Treasurer and Auditor of the Lessor shall be appointed as the Executive Officer, Treasurer and Auditor, respectively, of the Lessee with respect to the leased property, until January first, 1906, and in the event of the inability of any of such officers to act, by resignation or otherwise, his successor shall be selected by the Lessee, with the approval of the Lessor.

Article Ninth.—The Lessee covenants and agrees at its own proper cost and expense to maintain, operate and run the demised railroads and property during the said term in the same manner as the Lessor is now or shall at anytime hereafter be required or authorized by law to do; and shall and will keep all insurable property insured in reasonable amounts and rebuild all buildings and replace all property destroyed or deteriorated by fire or otherwise, to such an extent as to be unfit for use; and shall and will maintain, preserve and keep the railways and property hereby demised, including all property hereafter acquired, and every part thereof, in thorough repair, working order and safe 1856
and efficient condition, and supplied with rolling stock and equipment, so that the business of the said demised railways shall be preserved, encouraged and developed, the business thereof to be done with safety and expedition, the public be accommodated in respect thereto, with all practicable convenience and facilities and the future growth of such business as the same may arise or be reasonably anticipated be fully provided for and secured.

The Lessee further covenants and agrees, at the expiration or termination of this lease for any cause, to return and deliver the said railroad and railroads, real estate, and properties by this lease demised, including, among other things, all property, additions, improvements and equipments which shall be 1857
furnished, constructed or completed out of the proceeds of sale of the stock, bonds or property of the Lessor, to the Lessor in as good order, condition and repair as they were at the date this lease takes effect, or at the date when the same came into the possession of the Lessee, and to surrender said franchises, rights and privileges, easements and properties unimpaired by any act of the Lessee; excepting, however, all property of the Lessor sold pursuant to the terms hereof, the proceeds of which shall have been applied as herein provided.

The Lessee further covenants and agrees that it will at all times during the continuance of this lease, at its own expense, keep the said rolling stock, and tools, equipment, machinery and implements

necessary for the operation of the road, in good order, condition and repair, and will, as the same shall be worn out and rendered unserviceable, replace the same at its own expense, so that the said railroad and railroads shall always be kept, maintained and equipped in good and safe condition and effective working order.

The Lessee further covenants and agrees that it will at all times during the continuance of this lease, at its own expense, comply with all lawful requirements with respect to the construction, maintenance and operation of said railroads, extensions or branches thereof.

Article Tenth.—The Lessee covenants and agrees, at its own proper cost, from time to time, and whenever necessary for the use of the Lessor, to make out and furnish to said Lessor in duplicate any and all reports and statements which the latter shall or may hereafter be required by law to make and file; and to do and perform any and every act which the Lessor may from time to time be required by law to do and perform during the terms of this lease.

Article Eleventh.—The Lessee covenants and agrees that, in addition to the rentals herein elsewhere provided, it will pay and discharge as rent, as and when the same have or may become due, any and all taxes, assessments, license fees, water rents, duties, imposts, dues and charges whatsoever, whether ordinary or extraordinary, which previously to this lease have been or hereafter during the said term shall be levied, confirmed, assessed or imposed upon the Lessor, its capital, or shares of capital stock, or dividends, or upon the demised railroad or railroads, premises, real estate, personal property, franchises, easements, or any part thereof, or the business, earnings or income of the Lessor, or for the use or enjoyment thereof, by the United States, State, municipal or other lawful authority; provided, always, that the Lessee shall have the right before making such payment to contest the validity, legality, or amount of any such tax, assessment, license fee, water rents, duty, or charge upon any reasonable ground; and in case the same shall be contested as aforesaid, the time occupied in such contest shall

not be deemed a part of a reasonable time within which the Lessee is required to make such payment aforesaid. Should the Lessee fail to make any such payment aforesaid within the time herein required, then the Lessor may, after the expiration of said time, pay the same, with all accrued penalties, interest, costs and other charges connected therewith, and the Lessee agrees to repay as rent to the Lessor on demand the amount so paid.

The Lessee further covenants and agrees to pay as rent all rentals accruing or becoming payable during the continuance of this lease, under the terms of any contract or lease then existing between the Lessor and any person or corporation for the use of any real estate or property leased by the Lessor.

Article Twelfth.—Possession of the demised railways and premises shall be given by the Lessor to the Lessee at twelve o'clock and one second on the morning of the first day of April, nineteen hundred and three, and upon delivery of such possession, the Lessor shall transfer and deliver to the Lessee, for use upon or in connection with the said demised railways and premises, all moneys belonging to income account, (except moneys necessary to pay dividends previously declared), rolling stock, equipment, machinery, tools, implements, furniture, fuel, material or other railroad supplies belonging to the Lessor which shall have been procured for the use of the said railways.

The Lessee covenants and agrees to take over the leased property as a going concern, and agrees to pay all operating expenses due or to become due at or after the time of taking possession.

The Lessee shall at all times during this lease have the full and exclusive right to manage, use and control the demised property, and shall have, use and enjoy all the rights, powers and authority of the Lessor in that behalf, and all rights, powers, easements and privileges now possessed or which may hereafter be acquired by the Lessor necessary or convenient to the construction, maintenance, use, operation, possession and enjoyment of said railroad or railroads and any and all connections, extensions and branches thereof, which can or may be

lawfully exercised and enjoyed under its charter and the laws applicable thereto, in, about or in connection with said demised property and in the maintenance and operation thereof.

The Lessee may from time to time in its discretion, change, rebuild or duplicate the location or character of the whole or any part of any present or future line of railroad of the Lessor or change the motive power now used, or hereafter used, upon any such line, or the roadbed or structure of any such line, the consent of the Lessor having first been obtained, which consent the Lessor hereby agrees to give, provided the proposed action of the Lessee be reasonable and lawful.

Article Thirteenth.—The Lessee further covenants and agrees that it will proceed faithfully and diligently with the work of converting the said railroad and railroads into an electric railroad, and making all other improvements now contracted for, according to the present plans and contracts of the Lessor, but without assuming any liability under any of such contracts, and the Lessor covenants that it will facilitate and further such work by every means in its power, and will provide the funds therefor, by the sale of its capital stock, bonds or other property, real or personal, according to the provisions of Article Second hereof.

Article Fourteenth.—The Lessee further covenants and agrees that at the expiration of this lease or upon any sooner termination thereof, all property, extensions, branches, additions, improvements and equipments constructed, made or furnished by the Lessee out of its own funds to the said railroad or railroads, otherwise than in compliance with the provisions of this Indenture, shall remain for use upon or as part of said demised property, and shall be and become the property of the Lessor upon the payment by the Lessor of the reasonable value thereof.

Article Fifteenth.—The Lessee further covenants and agrees upon the expiration or any sooner termination of this lease, to surrender, transfer and deliver to the Lessor all tools, machinery, materials

and supplies on hand for use in the construction, maintenance or operation of said railroads of value at least equal to that of such property delivered to the Lessee by the Lessor, and upon payment by the Lessor of the amount, if any, that the value of such property then delivered may exceed the value of such property delivered at the date this lease takes effect. And the Lessee further covenants and agrees at the expiration of this lease or any sooner termination thereof, that it will execute and deliver to the Lessor a good and sufficient deed conveying to the Lessor any real estate acquired and paid for by the Lessee for use in connection with the construction, maintenance or operation of said railroads and property, upon payment by the Lessor of the reasonable value thereof.

Article Sixteenth.—The Lessee further covenants and agrees that the Lessor, its officers and its duly authorized committee or agent may at all times during the term by this lease demised, enter in and upon and have free access to the railroads and properties by this lease granted and demised, that it will keep, full, true and correct books of account, to which books, and to all contracts, vouchers and agreements, the Lessor's officers, committee or agent aforesaid shall have free access at all reasonable times, and that all deeds, muniments of title, agreements and other papers relating to settlements with abutting owners, papers evidencing franchises and charters, stock books, transfer books, and the sale of the Lessor shall remain in the custody of the Lessor, whose approval until January first, 1906, shall be necessary to the purchase of any real estate or interests therein with its money, and to all settlements with abutting property owners, and that it (the Lessee) shall have access to such papers at all reasonable times, and that said Lessee will furnish to such officers, committee or agent every facility to examine into the condition of the said railroads and properties and the system and manner of operating said railroads, and will pay all expenses incident to an examination and report upon the condition of the railroads and equipment of the Lessor, to be made by an expert or experts of its selection not oftener

than once in three years, and will when and as required properly mark for identification all rolling stock of the Lessor and all replacements thereof, and will also from time to time pay all expenses of transfer and registration of stock, and of printing or engraving stock certificates.

Article Seventeenth.—The Lessee further covenants and agrees that it will at the expiration of or any sooner termination of this lease for any cause transfer, deliver and return to the Lessor moneys belonging to income account, equal in amount to such moneys received at the inception of this lease, also rolling stock, equipment, power stations, electrical appliances, and equipment, implements, furniture, fuel, office furniture and office fixtures, and all other property of like kind or nature then owned or possessed by it for use in the construction, maintenance and operation of said demised railroad and railroads, and the said property so returned shall be equal in quantity and value to similar property received by it at any time from the Lessor under the terms of this lease; excepting, however, all property sold pursuant to the terms hereof, the proceeds whereof shall have been applied in accordance with the provisions of this lease."

V. The lease from Manhattan to Interborough includes four main parallel lines extending generally in a northerly and southerly direction through the Boroughs of Manhattan and Bronx, in the City of New York, which as to routes and track mileage are as follows (distances stated approximately as of April, 1929):

Second Avenue Line, extending from Chatham Square along Allen Street, First and Second Avenues to 129th Street and Second Avenue, including a branch over the Queensboro Bridge from 59th Street and Second Avenue to the Queensboro Plaza, known as the Queensboro Bridge Line, having a total length of route of 9 miles and a track mileage aggregating 28 miles;

Third Avenue Line (including the so-called Suburban Line), extending from South Ferry in the Borough

of Manhattan along Pearl Street, the Bowery, Third Avenue, Webster Avenue and partly over a private right of way, to White Plains Road and Gun Hill Road, in the Borough of the Bronx, New York City, with an additional main line extending from Park Row at City Hall to Chatham Square and a branch known as the 34th Street branch, extending from Third Avenue and 34th Street to the East River, a branch known as the West Farms Subway connection extending from Willis Avenue and 143rd Street to 194th Street near St. Ann's Avenue, and a main line extension from Fordham Road to Bronx Park, having a total length of route of 17 miles and a 187
track mileage aggregating 58 miles;

Sixth Avenue Line, extending from Morris Street along Church Street, West Broadway, Sixth Avenue and West 53rd Street to a connection with the Ninth Avenue Line at Ninth Avenue and 53rd Street, having a total length of route of 5 miles and a track mileage aggregating over 11 miles;

Ninth Avenue Line, extending from South Ferry, in the Borough of Manhattan, along Greenwich Street, Ninth Avenue, West 110th Street, Eighth Avenue and over the Harlem River and partly over a private right of way to a connection with the City-owned Lexington 187
Avenue Subway Line at Jerome Avenue and 162nd Street, having a total length of route of 11 miles, with a track mileage aggregating 42 miles.

VI. On March 19, 1913, Public Service Commission of the State of New York issued a certificate known as the "Elevated Extension Certificate" authorizing the construction, equipment and operation of certain additional tracks upon its Second, Third and Ninth Avenue lines. On or about March 15, 1913, Manhattan and Interborough entered into an agreement providing among other things that the plant and property to be constructed by the Interborough under said Certificate shall

be deemed additions or improvements to the demised property made by Manhattan as lessor under the terms of the 1903 lease. On or about May 1, 1922, a so-called "Plan of Re-Adjustment" and agreement was entered into between Manhattan and Interborough whereby, among other things, Interborough waived any claim against Manhattan by reason of past expenditures for additions and improvements but subject to whatever rights might pertain to Interborough's bondholders. The licenses granted by the Commission under the Elevated Extension Certificate for the additional tracks above referred to are for a period of eighty-five (85) years only; all other franchises of Manhattan are perpetual.

VII. Pursuant to the Elevated Extension Certificate of March 19, 1913 and an agreement between Manhattan and Interborough dated March 15, 1913, Interborough issued approximately $47,000,000.00 of its bonds and notes to provide for the improvement above stated upon Manhattan's elevated lines and extensions thereof and that of said sum, approximately $27,000,000.00 was for improvements upon the lines and the power house leased from Manhattan.

VIII. Upon information and belief Interborough and the Receivers thereof are utilizing and employing power generated in Manhattan's power houses not only for the use of the Manhattan Lines but also for the operation of Interborough's own lines.

IX. When the plan of re-adjustment and agreement between Interborough and Manhattan was entered into on or about May 1, 1922, it was upon the representation, statements and official reports of Interborough that the revenues from the lines leased by Manhattan and the revenue from its own lines were insufficient to meet the payments required to be made by it under the 1903 lease, which payments included among other things, payments

of taxes, interest on the outstanding indebtedness of Manhattan and the payment of 7% on $60,000,000.00 of capital stock of Manhattan, which dividend guarantee called for the payment of $4,200,000.00 annually. As a result of such claims made by the Interborough to the stockholders of Manhattan, approximately 92% of the stockholders waived the 7% guarantee rate and agreed that the dividend should be 3% in 1923, 4% in 1924 and 5% each year thereafter and further agreed that such dividend rate should not be required to be guaranteed but should be paid only if earned. Since the year 1928 Interborough has failed to make all of the payments due under the modified plan and agreement although Interborough or Manhattan has earned sums sufficient to make such payments.

X. The authorized capital stock of Manhattan is 600,000 shares of the par value of $100 each, all of which is outstanding. Of this amount approximately $55,655,000.00 or 92.75% is subject to the modification agreement of May 1, 1922. The plaintiff is one of holders of shares who did not agree to the modification.

The Company has a funded debt of approximately $40,663,000.00 which is a first mortgage upon the company's entire property excluding the extensions built by Interborough. Said mortgage matures in the year 1990 and the trustee thereunder is the Central Hanover Bank and Trust Company of New York. Manhattan's properties are further encumbered by a second mortgage in the amount of approximately $4,500,000 which matures in the year 2013. Annexed hereto, marked Exhibit 1, is a comparative balance sheet of Manhattan for the years ending June 30, 1930 and 1931, showing total assets as of June 30, 1930 of $114,863,000 and for 1931 of $114,885,000.00; also a comparative statement of income account of Manhattan for the years ending June 30, 1930 and 1931 showing gross operating revenue for the year 1930 in excess of $18,000,000.00 and for 1931, $16,800,000.00.

*Affidavit of J. Osgood Nichols.*

XI. Upon information and belief, Interborough was incorporated on May 6, 1902 under the General Railroad Law of the State of New York with a 1000 year charter. In addition to operating the Manhattan elevated properties in the Boroughs of Manhattan and The Bronx as hereinabove alleged, it operates subway lines in the City of New York under certain leases commonly known as Contracts Numbered 1, 2 and 3. Upon information and belief the subway roads are owned by the City of New York but the power house, electrical equipment and rolling stock used for the purpose of operating the subways are owned by Interborough.

XII. On or about August 26, 1932, the American Brake Shoe & Foundry Company filed a creditor's bill against Interborough in this court, reference to which is made as if the same were incorporated herein and made a part hereof, alleging among other things that Interborough was without funds to meet the following obligations:

> "A. Interest for six months on ten-year secured gold notes due and payable September 1, 1932, $1,108,523.50.
>
> "B. The principal of said ten-year gold notes due and payable September 1, 1932, $31,672,100.
>
> "C. Six months interest on unsecured ten-year 6 per cent gold notes due October 1, 1932, $315,000.
>
> "D. Principal of said 6 per cent notes, $10,500,000.
>
> "E. Rental payments on Manhattan elevated lease, due October 1, 1932, $914,802.50.
>
> "F. Rental payments due to same, December 1, 1932, $90,460.
>
> "G. Interest and sinking fund due on first and refunding mortgages gold bonds, January 1, 1933, more than $4,400,000."

The complaint further states:

> "It is further alleged on information and belief that the only way whereby the defendant can meet

its obligations under said contracts, certificates and leases and pay its floating indebtedness and discharge its current obligations, is by the continued maintenance and operation of said railroad by the continuous use hereof." • • •

"Notwithstanding the fact that every effort has been made to provide funds for the payment of indebtedness and to procure additional income and revenues from operations of subway and elevated lines, such efforts have proved unsuccessful. Unless some definite action is taken on behalf of all the creditors so that the operation of the railroads may be continued, great and severe loss and irreparable injury will be inflicted upon all creditors. The credit of the defendants has been seriously impaired, and it has no reasonable hope of securing assistance from any quarter."

The bill prayed for the appointment of a Receiver. Upon information and belief Interborough admitted the allegations of the bill, consented to receivership and the Receivers above-named were appointed by this Honorable Court.

XIII. In addition to Interborough's admission of its inability to meet the foregoing charges, Interborough is in default in the payment of taxes to the City of New York not only upon its own property but upon the properties of Manhattan in very large amount, the amount due and owing for taxes to the City of New York upon the Manhattan properties being approximately $300,000.00 at the present time, which taxes Interborough is under obligation to pay on behalf of Manhattan, as provided for in the 1903 lease. As hereinabove alleged Interborough is also in default in substantial amount upon the Manhattan stock as provided in the terms of the modification agreement dated May 1, 1922, the amount in default at the present time aggregating the sum of about $1,000,000.00.

XIV. Interborough has continued the operation of Manhattan's properties under the lease aforesaid and

the modification thereof although it is in default in the payments due thereunder and has otherwise defaulted in carrying out the terms, covenants and conditions of said lease on its part to be performed.

XV. Upon information and belief, Interborough from the date of the lease from Manhattan to Interborough and continuously ever since has had charge of the management and the operation of the Manhattan elevated railroads and has operated the elevated lines and the subway lines as one unit. As hereinabove alleged, the construction of the subway, additions, alterations and extensions were made upon the elevated lines and upon the subway lines so as to connect the elevated lines and subway lines at numerous points and the elevated lines and subway lines have been operated practically as one unit. Use has been made by Interborough of the same rolling stock and equipment for the purpose of operating the elevated lines and subway lines interchangeably and together, as one unit. The fare charged for the operation of the subway and the elevated lines has been and is a single fare for a continuous passage from elevated lines to the subway lines and vice versa.

For the purpose of improving the facilities of the subway lines and the elevated lines and for the purpose of operating the same as a single unit for rapid transit in the City of New York, more particularly in Manhattan and the Bronx, additions and alterations were made upon the elevated lines, the third tracks and express lines were added to several of the elevated lines, the power houses of Manhattan were increased, and large sums of money were expended by Interborough upon the Manhattan properties. Additional burdens were placed upon Manhattan thereby in the operation and maintenance of its railway lines and its power houses. In or about the year 1913, in order to provide the requirements necessary for the operation and maintenance of the subway

and elevated lines as one unit, Manhattan, at the request of Interborough, caused to be placed an additional mortgage upon its property, real estate, elevated railways, structure and equipment, etc., in excess of $4,500,000, under a trust indenture dated June 1, 1913, and maturing June 1, 2013. The Equitable Trust Company of New York is named as Trustee; the bonds bear interest at the rate of 4% per annum.

XVI. On information and belief, since the enlargement of Manhattan's power house and increased electric transmission, it is now and has been supplying power to Interborough for the use of its cars and trains operated on its own lines and over Manhattan's lines. Whether or not any account is kept of the power supplied by Manhattan for the use and benefit of Interborough is to your complainant unknown, but since said properties are operated as a unit, if no proper account is kept, adjustment should be made of the operating accounts between the two companies which shall duly compensate Manhattan for the operation of cars used by Interborough on the Manhattan's lines and for the use of power furnished by Manhattan on Interborough lines.

XVII. Upon information and belief, the equipment of Manhattan has been sold from time to time and its rolling stock, tracks and other things necessary to the operation of the elevated lines have been changed and re-built, all under the direction of Interborough. The books and accounts of Manhattan relating to all these transactions have been kept by Interborough. A full and detailed accounting of all these transactions should be made for the benefit of all parties financially interested in Manhattan.

XVIII. Upon information and belief since the appointment by this court of the said Dowling and Murray as receivers of Interborough, they have continued to

operate the subways and the elevated structures as one unit as heretofore and said receivers will in all likelihood propose to continue to operate such properties; that it is necessary to operate the said properties for the public service and public benefit as a single unit; that great inconvenience to the public will undoubtedly result if operation of the elevated lines were divorced from the subway lines and all the connections between both lines were discontinued likewise, if the power and rolling stock necessary to the operation of both lines either separately or as a unit were separated, and if the men employed in the operation of both lines were divided and separated, serious danger to safe operation may result as well as inconvenience to the public and irreparable loss to Manhattan and its security holders and stockholders would follow.

XIX. There being defaults as heretofore alleged on the part of Interborough under the terms of the lease, and having announced that it is unable to meet its obligations under the lease as well as its other obligations, Interborough and its Receivers are continuing and will likely continue to make use of Manhattan properties without complying with the terms of the lease and modifications thereof; that they are appropriating the funds and revenue of Manhattan for the account and use of Interborough; that such appropriation will cause a default of all the bonds of Manhattan and probable foreclosure thereof; that no proper provision has been made for compliance with the terms of the lease and that the breaches already caused and those which are threatened will cause serious, irreparable injury and large financial losses to Manhattan, its stockholders and bondholders.

XX. On information and belief, a sharp conflict of interest exists between Interborough and Manhattan by reason of breaches of the lease by Interborough which have already occurred; that there are present and con-

tinuing breaches of the lease by reason of the use of Manhattan properties, appropriation of its income, properties, rolling stock, equipment, power houses, power supplied and other properties, personal, real and mixed, all belonging to Manhattan, without provision for compensation to Manhattan and to its security holders and stockholders; that the Receivers appointed for Interborough property are under duty to protect the interests of Interborough and since the receivers are making use of the property of Manhattan without making proper provision therefor, it is necessary in the interest of the stockholders, bondholders and/or other parties in interest of Manhattan, that proper protection should be provided to Manhattan and all parties having any interest in Manhattan and that a receiver should be appointed by this court to care for, preserve and protect the interests of Manhattan, to see to it that proper arrangements are made for the use of Manhattan properties during the period of receivership, and that proper revenue shall be received by Manhattan from the receivers of Interborough to protect Manhattan's stockholders, bondholders and other security holders.

XXI. Upon information and belief, Manhattan is now in default to the City of New York for non-payment of taxes, by reason of the fact that Interborough has failed and neglected to pay the taxes. That because of such failure, Interborough has caused a breach in the covenants and conditions of the indentures of trust given by Manhattan to the trustees for the payment of its outstanding bonds; that the threatened failure on the part of Interborough to pay the amounts required to be paid under the terms of the lease, namely, the interest to be paid to the mortgage bondholders of Manhattan, and the failure to comply with other provisions under the terms of said bonds will cause the bondholders to begin foreclosure proceedings and cause the property to be sold, the subway lines and elevated lines to be separated, the

unity under which both lines are now being operated to be disrupted. Great public injury and irreparable damage is likely to result to the public as well as to Manhattan, and all parties having a financial interest in Manhattan. The shareholders of the 7% stock have the right to begin individual actions against Interborough for the payment of the sum due and owing to them under the terms of the lease and there is likely to result a multiplicity of suits against Interborough and/or against the Receivers, if the Receivers shall fail to pay these shareholders.

Upon information and belief, the holders of Manhattan first mortgage bonds and second mortgage bonds, if there should be a failure to pay to them the interest which will presently become due, and the stockholders also, may have the right to begin proceedings against the Interborough to prevent the Interborough from making use of the elevated lines and its equipment and property and all property leased to it by Manhattan and if any injunction shall be issued by any court or courts to prevent Interborough from making use of the elevated lines upon any suit or suits instituted by bondholders or stockholders or by the Manhattan itself or by the trustees for the bondholders, serious and irreparable injury is likely to result to all parties in interest as well as to the public and the property of Manhattan is likely to be rendered useless and likewise and/or the property of the subway lines are likely to be greatly impaired and injured and to be rendered useless unnecessarily and cause great inconvenience to the public.

XXII. On information and belief, such parties in interest including said bondholders, stockholders, noteholders and the Manhattan company through its officers and directors are likely to institute suits in the State Court or in other courts of competent jurisdiction and great conflict, confusion and serious losses are likely to result from lack of co-ordination and conflicting jurisdic-

tion. Serious questions will arise between the State Court and the Federal Court as to jurisdiction of common properties and the common and respective rights of both companies.

XXIII. In the event of unification, or consolidation, merger, or re-organization of Interborough and Manhattan, the interests of both companies and of all of the security holders, stockholders and the public can best be served by having all the parties before one court having sole and exclusive jurisdiction over all of the parties and over all of the properties and all things concerning the locations, operation and maintenance of both companies.

With exclusive jurisdiction of this court over both companies and with exclusive jurisdiction of the receivers appointed by this court for both companies and with the familiarity of the court of all of the affairs, business and operations of both companies, this court will best be able to determine the right of both companies concerning their respective properties and will be best able to fix and apportion the revenues and expenses where the companies are operating jointly or as a single unit over the roads of both companies and further will best be able to fix and apportion the cost of power used in the operation of through trains from the road of one company to the road of the other and apportion the compensation of employees and other expenses used in such joint operation.

XXIV. Upon information and belief it is the duties of the Receivers of Interborough to protect Interborough and all parties financially interested therein. Questions of conflict must of necessity arise because of the operation of through trains over both roads. The determination as to what share of the revenue from such operation should go to Manhattan, should not be left to the Receivers of Interborough. Manhattan should be protected by its own receivers whose duty it will be to protect the

rights of Manhattan and all parties financially interested therein. Likewise Manhattan should not be left exposed to the danger of foreclosure suits caused by breaches of the mortgages on its properties with the attendant danger that receivers appointed in foreclosure actions in the State Court may attempt to bar continued operation of through trains from the Interborough tracks to the Manhattan tracks or vice versa. All parties can best be served by the appointment by this court of Receivers who shall serve the interests of all parties and who shall be directed and instructed by this court to cooperate with the receivers appointed by this court of Interborough to the end that there shall be no disruption of the public service and that the public may be assured that the receivers of both roads are acting under the instructions of this court with directions to continue to operate as a single unit as heretofore. The safety to the public in the high speed rapid transit of both companies can best be assured by this court taking exclusive jurisdiction of both companies.

XXV. On information and belief several of the directors of Interborough are interlocked with the directorate of Manhattan; that the following directors of Interborough are also directors of Manhattan: Rouhac Anderson, resident of New York City; Thomas L. Parkinson of the Chase National Bank, New York City; Finley J. Shepard of Tarrytown, New York. As such directors, they are now serving conflicting interests and are responsible for the performance of their duties as such directors to both companies. In addition thereto, the above-named persons constitute three of the four members of the Executive Committee of Manhattan and accordingly control said Executive Committee. Also, one Charles Hayden of New York City is also a director of Interborough as well as a director of Manhattan, and is also a member of the Executive Committee of Interborough and is now and has been for sometime past a

director of Brooklyn Manhattan Transit Company. These directors dominate and control Manhattan.

XXVI. Upon information and belief, for sometime past, plans have been proposed and considered for the unification of the subway and elevated lines of Interborough, Manhattan and Brooklyn Manhattan Transit, which operates a line of railways and subways in Brooklyn and Manhattan. Negotiations for the consummation of such a unification plan have been going on for a period of many years past. Representing as some of the officers and directors do, conflicting interests, the unification plan, upon which negotiations are still pending, has not been consummated because of this representation of conflicting interests. Under the plan for the unification of these systems of rapid transit, the Manhattan bondholders and shareholders were offered at the rate of $80.00 for every $100 bond and $60.00 for every share of stock of Manhattan. Substantial offers have been made to the holders of Interborough securities including bondholders and stockholders and substantial offers were also made to the security holders of Brooklyn Manhattan Transit Company. By reason of the failure on the part of Interborough to pay the taxes upon Manhattan properties and its inability to meet its obligations to Manhattan bondholders, foreclosure proceedings may result which may destroy the unified system existing between Manhattan and Interborough, and the benefits and advantages which the stockholders of Manhattan were to receive under the unification plan may be destroyed or lost unless this court shall take into its custody the Manhattan properties for the benefit of all parties, to the end that the proposed unification plan may eventually be accomplished and the interests of Manhattan, its bondholders, shareholders and security holders may be properly protected by the court's receiver or receivers.

The officers and directors of Manhattan by reason of the interlocking directorates and being dominated by In-

terborough and being unable to preserve and protect the property of Manhattan and having failed to protect the stockholders and security holders of Manhattan and having been unable to function in the interests of the shareholders and security holders for their proper protection by reason of the domination and control of Manhattan by Interborough, it is necessary and essential that Manhattan as well as Interborough shall be managed and controlled under the surveillance of this court through its receivers operating under orders and decrees of this court. Unless receivers are appointed, the property of Manhattan and the interests of the stockholders and the other security holders are likely to be irreparably injured, wasted or seriously diminished.

XXVII. On information and belief, Interborough has diverted large sums of money out of its revenues, gross and net income, and has paid the same to the City of New York, purporting to have paid same under the terms of contracts numbered 1, 2 and 3, as so-called rental for the subways, when it should have set aside such funds for the purpose of discharging its obligation to Manhattan and to its noteholders, bondholders and shareholders, as provided for under the terms of the lease; that the sums so paid to the City of New York amounting to several millions of dollars were paid over the protest of shareholders of Manhattan; that such payments were illegally made, and should not have been made to the City of New York until sufficient revenue had been set aside by Interborough to meet the obligations due and owing to Manhattan, its noteholders and shareholders as provided under the terms of the lease and/or its modification; that the officers and directors of Manhattan have known of such payments, but took no action to restrain or prevent Interborough from diverting such funds to the City of New York; that the failure on the part of the directors to protect the interests of Manhattan has caused great waste and loss to Manhattan, and further caused

a breach of the terms of the lease from Manhattan to Interborough.

The complainant further avers that other shareholders, residents of this jurisdiction, holding a substantial number of shares in addition to his own but unable to become parties to this action by reason of their residence here, also owners of both first and second mortgage bonds of Manhattan, who are residents of this district, have informed complainant that they too, urge the appointment of receivers by this court upon the allegations herein stated in order that all parties may be protected and safeguarded.

XXVIII. The complainant has made no demand upon the officers and directors of this corporation to institute proceedings for the relief herein sought for the reason that a great emergency exists for the immediate appointment of receivers of Manhattan upon the grounds that the receivers appointed for Interborough are appropriating the revenues from Manhattan on behalf of Interborough and are making no payments therefrom to Manhattan; that Manhattan has no funds of its own to meet obligations already due and owing, nor has it funds to meet payments to its bondholders which are presently to become due and owing; that with such a condition Manhattan may be forced to terminate its lease with Interborough forthwith and attempt to operate its own road; that in such event, it will have no funds with which to carry on such operation; that the continued operation of through trains from the Manhattan tracks to the Interborough tracks or vice versa may be disrupted; that the public service may and is likely to become seriously impaired and endangered; that with the uncertainties which have arisen in the minds of the public and among the employees of Interborough and Manhattan, grave danger is apt to arise in connection with the operation of the high speed trains and the rapid transit conducted by both roads; that assurances should be given to the

public and employees of both roads forthwith that the operation of Manhattan as well as Interborough will continue as heretofore and that the roads operations will be under the exclusive jurisdiction of and direction of this court; that no demand has been made upon the further grounds that Interborough having admitted in its answer that it is unable to meet the obligations due and owing from it to Manhattan and will be unable to meet the obligations due and becoming due from Interborough to Manhattan, various actions are likely to be instituted in different jurisdictions, including foreclosure actions and suits by stockholders and bondholders; that such actions will result in great confusion and complication and will endanger not only the rights of parties financially interested in Manhattan, but will cause great inconvenience and perhaps danger to the public as well, that this court should forthwith take immediate jurisdiction of Manhattan so that exclusive control of the operation of both roads and the through and connecting lines of both roads shall be vested under one authority.

Upon information and belief, the officers and directors of Manhattan have taken no action to safeguard the rights of Manhattan in the present situation and it is impossible to determine what, if any, action will be taken by them inasmuch as several of the directors of Interborough are also directors of Manhattan, and as heretofore alleged, three of the directors of Interborough constitute three of the four members of the Executive Committee of Manhattan; that the interests of these directors are conflicting and that it is impossible for such directors, particularly those controlling the executive committee of Manhattan to act independently and adequately and fully to protect the rights of Manhattan as against Interborough when acting in such dual position; that various questions of the rights of the Interborough and Manhattan must necessarily arise, particularly as to operating and maintenance costs and revenues, in connection with the operation of through trains from one line to the

other; the determination and apportionment of compensation to employees engaged in through train operations, the determination of the rights of Manhattan and Interborough on the extra trackage built by Interborough on Manhattan's roads and questions arising with respect to the liability of Interborough to Manhattan because of breaches of the lease by Interborough; the fixing of the rights of Manhattan as against Interborough in the event of unification, consolidation or merger of both roads; and the immediate determination by the court acting upon the advices of independent receivers of both companies as to the proper disposition and allocation of the revenues received by the receivers in the operation of Manhattan and Interborough; the determination as to what sums it shall be just and proper for the receivers of Interborough to pay to Manhattan's receivers; that such apportionment can best be done by having one jurisdiction over both properties.

Upon information and belief, the directors of Manhattan who are directors of Interborough have known for some time past that Interborough defaulted in the payment of taxes on Manhattan's properties and further have known that Interborough has earned sufficient money with which to pay the interest on the bonds and make payments to the stockholders of the corporation, and have known that notwithstanding such earnings, Interborough planned to default upon the payments about to become due the bondholders and/or stockholders of Manhattan; that Manhattan's directors have failed to protect and safeguard the rights of Manhattan and have failed to take proper action on account of Interborough's defaults. Because of the great emergency which exists, the intertwined relations between both companies, both financially and through their properties, the irreparable injury which is likely to occur, the danger of multiplicity of suits in other courts, and the confusion and complications which may result therefrom, the complainant has been impelled to apply to this court for

the protection of Manhattan, its noteholders, bondholders, shareholders and all other parties in interest, and to ask this court to take the property into its immediate custody and appoint receivers for the protection of all parties involved and thereby to safeguard Manhattan's properties and rights.

Further, if the receivers of Interborough disaffirm or attempt to disaffirm the lease with Manhattan, Manhattan will be unable to carry on the operations of lines having neither funds sufficient to do so nor a personnel of its own equipped or trained to carry on its operations. Without such funds, its transit facilities for the public will close down. With the appointment of receivers, receivers certificates may issue to borrow funds sufficient to maintain the operations of the lines and such receivers taking possession immediately will be able to procure expert personnel in time to continue the operations of the lines.

WHEREFORE, complainant files this bill of complaint on behalf of himself and all other stockholders for the benefit of the corporation, and prays

1. That an account shall be taken of all sums due and owing to Manhattan by Interborough;

2. That there shall be fixed and determined the amount to be paid by the receivers of Interborough to Manhattan for the use, occupation and operation of the properties, trackage facilities, railroad facilities, cars, equipment, power, compensation of employees and all other items properly chargeable to the receivers of Interborough;

3. That the damages caused by the breach of the lease between Manhattan and Interborough shall be fixed and determined, or in the alternative, that the court shall decree specific performance of the lease between Interborough and Manhattan;

4. That the court shall determine the respective rights, duties, obligations and liabilities of Manhattan

and Interborough and shall enter such order, decree and judgment as shall seem equitable and meet in the premises;

5. That this Honorable Court will forthwith appoint a receiver or receivers of all and singular the property and assets of every nature, wheresoever situated, held, owned or controlled by Manhattan, with full power and authority to take into their possession, hold, manage and operate the business and properties of the defendants, and receive and collect the rents, issues and profits thereof, with such powers as this Honorable Court may from time to time grant, including the power to borrow money on receiver's certificates or otherwise, and for that purpose to incur such expenses as may be necessary or advisable in connection therewith, to purchase and sell, for cash or on credit, such merchandise, supplies, equipment, materials or other property as may be necessary or advisable in connection with the administration of the assets of Manhattan and the continuation of its business to such extent as may be authorized by this Honorable Court; to bring suit for, collect, receive and take into his or their possession all the property and assets, real, personal, or mixed, goods, chattels, credits, rights, claims and equities, books, papers, securities, cash and other property whatsoever and wheresoever situated; and in continuing, managing and operating said business, so far as authorized by this Honorable Court, to act in association with any receiver or receivers who may be appointed by any other court to take possession of and operate any property of said Manhattan situated outside the jurisdiction of this court, and to that end to transfer and consent to the transfer from time to time of such raw materials, materials in process, finished products, moneys and credits to and from this jurisdiction and any such other jurisdiction for the purpose of said business to the extent that the conduct thereof may from time to time reasonably require, and to cooperate to the fullest extent with any such other receiver or receivers in continuing, managing and operating said business, so far

as authorized by this Honorable Court, as a whole, and in arranging for and making such transfers; to appoint and employ such managers, agents, employees, servants, accountants, attorneys and counsel as may in his or their judgment be advisable or necessary in the management, conduct, control or custody of the affairs of the defendants and of the assets thereof, and to make such payments and disbursements as may be needful or proper for the purposes aforesaid or otherwise for the preservation and operation of the properties of Manhattan, so far as authorized by this Honorable Court, including authority to make payment of debts entitled to priority and of the wages and salaries of agents, employees, laborers and servants of said Manhattan, accrued or to accrue, which are entitled to priority by statute or which said receiver or receivers shall deem to be necessary or expedient to pay to secure the continuation of their services or to avoid detriment to the working organization of the business; to institute, prosecute and defend, compromise, adjust, intervene in or become a party to suits, actions, proceedings at law, in equity, or in admiralty, including ancillary proceedings in state or federal courts or courts of foreign nations, and likewise to defend, compromise or adjust, or otherwise dispose of any or all suits, actions or proceedings instituted against him or them as receiver or receivers or against Manhattan, and also to appear in and conduct the prosecution or defense of any suit or adjust or compromise actions or proceedings now pending in any court by or against Manhattan, and to compound and settle with all debtors of said defendants, with persons having possession of its property, or in any way responsible at law or in equity to Manhattan, and with the further usual powers of receivers in such cases; and that the officers, managers, superintendents, agents, attorneys, and employees of Manhattan be required forthwith to deliver up to said receiver or receivers the possession of all and every part of the properties of the defendant Manhattan, wheresoever situated, including the several books, vouchers and papers in any way relating

to the business or corporate proceedings of the defendant;

6. That this Honorable Court administer all and singular the property rights and business belonging to Manhattan and will adjudicate, enforce and adjust the rights, liens, equities and claims of all the creditors of the defendants, including the claim of complainants, as the same may be determined; to adjust the rights between Manhattan and Interborough;

7. That all creditors, stockholders and other persons be enjoined permanently and pendente lite from instituting or prosecuting or continuing the prosecution of any actions, suits or other proceedings at law or in equity or under any statute against Manhattan, and from levying any attachments, executions or other processes upon or against any of the properties of Manhattan, and from taking or attempting to take into their possession any part of the property of Manhattan, and from doing any act whatsoever to interfere with the possession of and management by the said receiver or receivers of the properties of Manhattan, or in any way to interfere with the said receiver or receivers in the discharge of his or their duties, or to interfere in any way with the administration and disposition in this suit of the affairs and properties of Manhattan;

8. That all creditors of Manhattan, and all persons interested in Manhattan be permitted to intervene in and become parties to this suit if and as permitted and authorized so to do by this Honorable Court;

9. That this complainant shall have such other and further relief as to the court may seem just and equitable in the premises together with the costs of this action.

LAWRENCE BERENSON,
*Attorney for Complainant,*
Office & P. O. Address,
One Wall Street,
Borough of Manhattan,
City of New York.

## EXHIBIT 1.

COMPARATIVE BALANCE SHEET, JUNE 30.

| *Assets* | *1931* | *1930* |
|---|---|---|
| Cost of road and equipment... | $ 98,929,654 | $ 98,929,654 |
| Cost of leases ..... | 14,014,000 | 14,014,000 |
| Special deposits ..... | 1,020 | 1,020 |
| I. R. T. Co. lease account..... | 377,323 | 377,323 |
| Unamortized bond discount and expenses ..... | 610,456 | 611,930 |
| Miscellaneous assets ..... | 869,123 | 867,648 |
| Cash ..... | 70,882 | 49,165 |
| Accounts receivable ..... | 12,963 | 13,013 |
| 937 Total assets ..... | $114,885,421 | $114,863,753 |
| *Liabilities* | | |
| Capital stock (par $100)..... | $ 60,000,000 | $ 60,000,000 |
| Prem. on cap. stk. ..... | 1,809,382 | 1,809,382 |
| Funded debt ..... | 45,206,000 | 45,206,000 |
| Current Liabs. ..... | 3,602 | 3,328 |
| Suspense acct. ..... | 268,803 | 268,803 |
| Surplus ..... | 7,597,634 | 7,576,240 |
| Total liabilities ..... | $114,885,421 | $114,863,753 |

EQUITIES FOR STOCK—Balance sheet, June 30, 1931, indicated total book value of $54,782,560 (excluding $610,456 un-amortized bond discount and expense and $14,014,000 cost of leases, but including $1,809,382 premium on capital stock applicable to the 938 600,000 shares of capital stock (par $100), or $91.30 per share, compared with $92.60 per share on June 30, 1930.

INCOME ACCOUNT, YEARS ENDED JUNE 30 (leased lines only—excluding jointly operated properties)

| | *1931* | *1930* |
|---|---|---|
| Gross revenue ..... | $16,803,896 | $18,001,319 |
| Operating exp. ..... | 13,254,944 | 13,823,748 |
| Taxes ..... | 1,936,463 | 1,969,884 |
| Operating inc. ..... | 1,612,489 | 2,207,687 |
| Other income ..... | 18,447 | 84,859 |
| Total income ..... | 1,630,936 | 2,292,546 |
| Bond int. & rentals ..... | 1,926,169 | 1,938,203 |
| Net income ..... | d 295,233 | 354,343 |
| Dividend requir. ..... | 3,087,020 | 3,087,020 |
| Avail. for I. R. T. charges..... | d 3,382,253 | d 2,732,677 |
| | *Times Earned* | |
| Fixed charges ..... | 0.85 | 1.18 |

d Deficit.

*Affidavit of J. Osgood Nichols.*

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HARRY BARBER,
*Complainant,*
*against*

MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as RECEIVERS OF THE INTERBOROUGH RAPID TRANSIT COMPANY, and THE CITY OF NEW YORK,
*Defendants.*

Upon reading and filing the bill of complaint herein, verified August 29, 1932, and the annexed affidavit of Lawrence Berenson, verified the 29th day of August, 1932, and the exhibits annexed to the complaint,

ORDERED, that the defendants or their attorneys show cause before this court, at Room 439 of Old Post Office Building, Park Row, Borough of Manhattan, New York City, on the 6th day of September, 1932, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why orders should not be issued appointing a receiver or receivers of the defendant Manhattan Railway Company, and why the complainant should not have such other and further relief as to the court may seem just and proper in the premises.

Sufficient reason appearing therefor, let the service of a copy of this order and the annexed affidavit upon the defendants above named or their attorneys on or before the 31st day of August, 1932, be deemed sufficient service thereof.

Dated: New York, August 29th, 1932.

(Sgd) MANTON

*Affidavit of J. Osgood Nichols.*

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HARRY BARBER,
*Complainant,*
*against*

MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as RECEIVERS OF THE INTERBOROUGH RAPID TRANSIT COMPANY, and THE CITY OF NEW YORK,
*Defendants.*

TO THE HONORABLE JUDGES OF THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of LAWRENCE BERENSON respectfully shows and represents:

1. That he is the solicitor for the complainant in the above entitled action and is duly admitted to practice before this court and in all other courts in the State of New York.

2. That this petition is filed on behalf of the complainant and at his request, because the complainant is not within this jurisdiction, being a citizen of and resident of Boston, Massachusetts, where he is at the present time.

3. That the complainant is a record holder of twenty (20) shares of the capital stock of the defendant Manhattan Railway Company, of which the complainant has informed your petitioner he has been such holder of record continuously for more than one year, and prior to the time of the transactions complained of in the bill of complaint herein; that complainant did not acquire

such shares for the purpose of bringing a collusive suit or for the purpose of conferring jurisdiction of this action upon this court, and that this suit is not a collusive one and is brought in good faith for the benefit of the Manhattan Railway Company.

4. That your petitioner is counsel for other persons financially interested in the Manhattan Railway Company, to wit, the holder of two hundred and thirty (230) shares of stock of the company, having a par value of $23,000, and $10,000 of the second mortgage bonds of the company. Your petitioner has also been consulted by other owners of capital stock of the company, holding substantial numbers of shares therein. That said persons have not joined in this suit because they are residents of the State of New York. But the holder of the two hundred and thirty (230) shares of the 7% capital stock of Manhattan Railway Company and the owner of the $10,000 bonds has read the bill of complaint herein and is familiar with all of the allegations thereof, and has requested your petitioner to state that he favors and urges the relief sought herein and the appointment of receivers for Manhattan Railway Company. 19

5. Your petitioner avers that receivers should be appointed forthwith for the Manhattan Railway Company upon the grounds set forth in the bill of complaint therein and the allegations therein contained. 194

Wherefore, your petitioner prays that the prayers for relief contained in the bill of complaint be granted by this Honorable Court and that receivers of Manhattan Railway Company be appointed as set forth in said prayers. That no previous application has been made for this relief.

Dated: New York, August 29th, 1932.

(Sgd) Lawrence Berenson,
Petitioner,
Office & P. O. Address,
One Wall Street,
Borough of Manhattan,
New York City.

*Affidavit of J. Osgood Nichols.*

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HARRY BARBER,
*Complainant,*
*against*

MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as RECEIVERS OF THE INTERBOROUGH RAPID TRANSIT COMPANY, and THE CITY OF NEW YORK,
*Defendants.*

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

LAWRENCE BERENSON being duly sworn, deposes and says:

That he is the solicitor for the Complainant in the above entitled action; that your deponent knows of no other suits pending against the defendant Manhattan Railway Company for the relief sought herein or for the appointment of a receiver of said Manhattan; that your deponent made inquiry in this court to ascertain whether any suit of like or similar nature had been filed, and he was informed that no such bill has been filed up to the present time; that he has read the morning and evening editions of newspapers published in the City of New York for the past three weeks and has not

observed in such newspapers any news item referring to a suit similar or of like nature to the present action.

To the best of your deponent's knowledge, information and belief no similar suit has been filed in this court or in the courts of the State of New York, or elsewhere.

(Sgd) LAWRENCE BERENSON.

Subscribed and sworn to before me
this 29th day of August, 1932.
SIDNEY BURGER
Notary Public
(SEAL) New York County #1589
Com. expires March 30, 1933.

*Affidavit of J. Osgood Nichols.*

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HARRY BARBER,
*Complainant,*
*against*

MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as RECEIVERS OF THE INTERBOROUGH RAPID TRANSIT COMPANY, and THE CITY OF NEW YORK,
*Defendants.*

ORDER AND PETITION.

This cause came on to be heard at this term, and thereupon, upon consideration thereof, it was

ORDERED, ADJUDGED AND DECREED as follows, viz.:

1. That the prayer of the petition annexed of Lawrence Berenson, verified August 29, 1932, be and the same hereby is granted, and that leave hereby is given to the complainant to file in this Court the bill of complaint mentioned in said petition, with said defendant Interborough Rapid Transit Company and said Receivers among the parties defendant thereto.

Dated, New York, August 29th, 1932.

MANTON,
U. S. J.

*Affidavit of J. Osgood Nichols.* 19

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

HARRY BARBER,
*Complainant,*
*against*

MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as RECEIVERS OF THE INTERBOROUGH RAPID TRANSIT COMPANY, and THE CITY OF NEW YORK,
*Defendants.* 19

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of LAWRENCE BERENSON respectfully shows to this Honorable Court:

1. That he is the solicitor for the complainant in the above entitled action. 195

2. That Messrs. Victor J. Dowling and Thomas E. Murray were duly appointed Receivers by this Court on or about August 26, 1932, of the above named Interborough Rapid Transit Company.

3. That upon information and belief, the order appointing such Receivers contains certain restraining provisions among them restraining the institution or prosecution of suits against the Interborough Rapid Transit Company aforesaid.

*Affidavit of J. Osgood Nichols.*

4. That your petitioner respectfully begs leave of this Court to make the Interborough Rapid Transit Company a party defendant in this suit and that the Receivers above named of said Interborough also be joined as parties defendant upon the grounds that said Receivers are operating the lines of the defendant Manhattan Railway Company, of which complainant is a stockholder, and that an accounting of such operation should be made by Interborough Rapid Transit Company and its Receivers for the use and operation of Manhattan's lines, for the use of its power houses, trains, tracks, station facilities, etc. and also for the other matters referred to in the bill of complaint herein which is incorporated herein by reference and made a part hereof.

Wherefore, your petitioner prays leave of this Honorable Court to file its said bill of complaint and to include among the parties defendant thereto Interborough Rapid Transit Company and said Receivers, and that an order granting such relief may be made by this Honorable Court, and entered in the above entitled cause.

And your petitioner, as in duty bound, will ever pray, etc.

Lawrence Berenson,
Petitioner,
Office and Post Office Address,
One Wall Street,
Borough of Manhattan,
New York City.

*Affidavit of J. Osgood Nichols.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In conformity to the provisions of Section 18 of the Judicial Code of the United States, the public interest requiring such action, HON. E. HENRY LACOMBE U. S. Circuit Judge is hereby designated and appointed to hold a district court in the Southern District of New York, beginning Monday April 22d 1912 for the trial of civil jury causes and the disposition of such other business as may come before him at such session.

New York, April 9th, 1912.

E. HENRY LACOMBE
Senior Circuit Judge.

Filed Apr. 10, 1912.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

PARSONS NON-SKID COMPANY, Limited, and WEED CHAIN TIRE GRIP COMPANY,

*Complainants,*

*against*

W. E. PRUDEN HARDWARE COMPANY,

*Defendant.*

It appearing to me from the bill of complaint and papers on motion for preliminary injunction filed in the office of the clerk of the United States District Court

for the Southern District of New York in the suit brought by Parsons Non-Skid Company, Limited, and Weed Chain Tire Grip Company, Complainants, against W. E. Pruden Hardware Company, Defendant, now pending in said court that public interest requires that all motions, the final hearing and all other court proceedings herein be made and had and determined by Honorable E. Henry Lacombe, a judge of the United States Circuit Court of Appeals for the Second Circuit in which said district lies.

I do hereby designate and appoint Honorable E. Henry Lacombe, a judge of the United States Circuit Court of Appeals for the Second Circuit, to hold the United States District Court for the Southern District of New York for the purposes of hearing and determining all motions to be made and the final hearing to be had, and all other court proceedings in said suit.

Dated, New York January 17, 1913.

E. Henry Lacombe
Senior Circuit Judge of the United States Circuit Court of Appeals for the Second Circuit.

*Affidavit of J. Osgood Nichols.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

PARSONS NON-SKID COMPANY, LIMITED, and WEED CHAIN TIRE GRIP COMPANY,

*Complainants,*

*against*

EDWIN S. HOLMES, JR., RANDOLPH T. WARWICK, LEO TOBRINER, CHARLES BAUER and Q. D. HOOK COMPANY,

*Defendants.*

It appearing to me from the bill of complaint and papers on motion for preliminary injunction filed in the office of the Clerk of the United States District Court for the Southern District of New York in the suit brought by Parsons Non-Skid Company, Limited, and Weed Chain Tire Grip Company against EDWIN S. HOLMES, JR., RANDOLPH T. WARWICK, LEO TOBRINER, CHARLES BAUER and C. D. Hook Company, defendants, now pending in said Court that public interest requires that all motions, the final hearing and all other court proceedings herein be made and had and determined by Honorable E. Henry Lacombe a Judge of the United States Circuit Court of Appeals for the Second Circuit in which said district lies.

I do hereby designate and appoint Honorable E. Henry Lacombe, a Judge of the United States Circuit Court of Appeals for the Second Circuit, to hold the United States District Court for the Southern District of New York for the purposes of hearing and determin-

ing all motions to be had, and all other Court proceedings in said suit.

Dated, New York, January 17, 1913.

E. HENRY LACOMBE,
Senior Circuit Judge of the United States Circuit Court of Appeals for the Second Circuit.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In order to meet the requirements of the public interest and under the authority conferred by Sec. 18 of An Act to Codify, Revise and Amend the Laws relating to the Judiciary, approved March 3rd, 1911, as amended, I hereby designate United States Circuit Judge E. HENRY LACOMBE, to hold sessions of the District Court for the Southern District of New York for the hearing of motions on July 29th, August 12th and September 9th, 1914.

The date of any of these assignments may be changed at the pleasure of the Judge assigned to sit, to some other regular motion day.

E. HENRY LACOMBE
Senior Circuit Judge,
Second Circuit.

Filed June 30, 1914.

*Affidavit of J. Osgood Nichols.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In order to meet the requirements of the public interest and under the authority conferred by Sec. 18 of An Act to Codify, Revise and Amend the Laws relating to the Judiciary, approved March 3rd, 1911, as amended, I hereby designate United States Circuit Judge E. HENRY LACOMBE, to hold sessions of the District Court for the Southern District of New York for the hearing of motions on July 14th, August 11th and September 15th, 1915.

The date of any of these assignments may be changed at the pleasure of the Judge assigned to sit, to some other regular motion day. 1

E. HENRY LACOMBE
Senior Circuit Judge,
Second Circuit.

Actually sat July 31.
Filed June 16, 1915.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In order to meet the requirements of the public interest and under the authority conferred by Section 18 of an Act to Codify, Revise and Amend the Laws relating to the Judiciary approved March 3, 1911, as amended, I HEREBY DESIGNATE AND APPOINT United States Circuit Judge HENRY GALBRAITH WARD, to hold a session of the District Court for the Southern District of New York for the trial of Admiralty causes, beginning on May 7, 1918. 19

Dated, April 29, 1918.

H. G. WARD
Senior Circuit Judge
of the Second Circuit.

Filed Apr. 29, 1918.

*Affidavit of J. Osgood Nichols.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In order to meet the requirements of the public interests and under the authority conferred by Section 18 of The Judicial Code as amended, I HEREBY DESIGNATE and APPOINT United States Circuit Judge HENRY GALBRAITH WARD to hold a session of the District Court for the Southern District of New York for the trial of causes and the hearing and disposition of such business as may come before him during the period beginning June 2, 1919 and ending June 30, 1919.

Dated: May 27, 1919.

H. G. WARD
Senior Circuit Judge of the
Second Circuit.

Filed May 27, 1919.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In order to meet the requirements of the public interest and under the authority conferred by Section 18 of the Judicial Code as amended by the Act of Congress approved September 14, 1922, I HEREBY DESIGNATE AND APPOINT United States Circuit Judge HENRY WADE ROGERS of the Second Circuit to hold a session of the District Court for the Southern District of New York for the trial of causes and the hearing and disposition of motions, petitions for naturalization, and such exparte and other business as may come before him during the period beginning May 11, 1923, and ending May 12, 1923.

Dated, May 11, 1923.

HENRY WADE ROGERS
Senior Circuit Judge of the
Second Circuit.

Filed May 11, 1923.

*Affidavit of J. Osgood Nichols.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In order to meet the requirements of the public interest and under the authority conferred by Section 18 of the Judicial Code as amended by the Act of Congress approved September 14, 1922, I HEREBY DESIGNATE AND APPOINT United States Circuit Judge CHARLES M. HOUGH of the Second Circuit to hold at any time a session, or sessions of the District Court for the Southern District of New York for the trial of causes and the hearing and disposition of motions, petitions for naturalization, and such ex-parte and other business as may come before him.

Dated: September 16, 1926.

CHAS. M. HOUGH
Senior Circuit Judge
of the Second Circuit.

Filed Sep. 16, 1926.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In order to meet the requirements of the public interest and under the authority conferred by Section 22 of Title 28 of Code of Laws of the United States, I HEREBY DESIGNATE AND APPOINT UNITED STATES CIRCUIT JUDGE MARTIN T. MANTON of the Second Circuit to hold at any time a session, or sessions of the District Court for the Southern District of New York for the trial of causes and the hearing and disposition of motions, petitions for naturalization, and such ex-parte and other business as may come before him.

Dated: March 20, 1930.

MARTIN T. MANTON,
Senior Circuit Judge of the
Second Circuit.

984 *Affidavit of J. Osgood Nichols.*

DESIGNATION OF HONORABLE EDMUND WADDILL, JR., CIRCUIT JUDGE, TO HOLD A DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

UNITED STATES OF AMERICA,

FOURTH CIRCUIT.

It appearing to the undersigned, Senior Circuit Judge in and for the Fourth Judicial Circuit upon the motion of the United States Attorney, that the public interest
985 requires the designation of some circuit Judge to hold a District Court of the United States for the Eastern District of Virginia, at Norfolk, I do hereby, in conformity with the provisions of Section 18 of the Judicial Code, as amended by the Act of Congress approved September 14, 1922, designate and assign the Honorable Edmund Waddill, Jr., United States Circuit Judge for the Fourth Judicial Circuit, to hold said District Court of the United States for the Eastern District of Virginia, at Norfolk, on the 23rd day of August, 1928, in the matter of the removal proceedings against Manville H. Sprague.

GIVEN UNDER MY HAND in the said Fourth Judicial Circuit, this 23rd day of August, in the year of our Lord
986 one thousand nine hundred and twenty-eight.

The Clerk of the said District Court of the United States for the Eastern District of Virginia shall enter and transmit a certified copy of the above designation and assignment to the Honorable Edmund Waddill, Jr., and the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Va., forthwith.

EDMUND WADDILL, JR.,
Senior Circuit Judge, Fourth Circuit.

(SEAL)

A true copy teste:

JOSEPH P. BRADY, Clerk,
By PAUL R. FLANAGAN, Deputy Clerk.

## Affidavit of Martin A. Leach.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON,<br>Complainant,<br>*against*<br>MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,<br>Defendants. | IN EQUITY<br>E 71-153<br>1932. |

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MARTIN A. LEACH, being duly sworn, deposes and says:

I was present in Judge Manton's chambers during the hearing on September 6, 1932, on a motion by the plaintiff in the action of *Barber* v. *Manhattan Railway Company et al.* for the appointment of a receiver for Manhattan Railway Company.

*Affidavit of Martin A. Leach.*

During the course of that hearing, I made a complete stenographic report of everything said. The excerpts quoted in the affidavit of J. Osgood Nicolls are a true and correct copy of the verbatim report of the proceedings held before Judge Manton on September 6, 1932.

MARTIN A. LEACH

Sworn to before me this
5th day of October, 1932.

ROWLAND W. PHILIPS
Notary Public, Nassau County
New York County Clerk's No. 392
Kings County Clerk's No. 130
Commission expires March 30, 1934
(SEAL)

## Affidavit of William Roberts.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

*against*

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

STATE OF NEW YORK )
COUNTY OF NEW YORK ) ss.:

WILLIAM ROBERTS, being duly sworn, deposes and says:

On September 6, 1932, he was appointed Temporary Receiver of the Manhattan Railway Company in a cause in Equity E 70-364 pending in the United States District Court for the Southern District of New York, and that he

is the person referred to as Tempoary Receiver of Manhattan Railway Company in an order to show cause, signed by Francis G. Caffey, United States District Judge in the above entitled proceeding, which order is dated September 21, 1932, and returnable on October 4, 1932.

The order to show cause was secured on a petition and complaint by one Benjamin F. Johnson, who alleges that he is the owner of 100 shares of stock of Manhattan Railway Company. Deponent submits this affidavit in answer to certain allegations of the bill of complaint herein, which by reference in the petition for the order to show cause are among the grounds for complainant's prayer that the order appointing deponent temporary receiver for the Manhattan Railway Company should be vacated and set aside.

In paragraph "(14)" of the bill of complaint, complainant refers to the appointment of deponent as receiver for Manhattan Railway Company and makes a general charge that his continuance in office does not and will not insure independence of action or protection of its creditors and security holders. The particulars of this general charge are alleged in paragraph "(16)" of the bill of complaint as follows:

> "That said William Roberts was and is the President and Counsel for the Manhattan Railway Company, and it is believed that his appointment was sponsored and made at the instance of the Brooklyn - Manhattan Transit Company - Interborough interests, and not at the instance or sponsorship of complainant or any of the other stockholders of Manhattan. Complainant believes, and therefore avers, that said appointment of William Roberts was irregular and improper. Moreover, that there is an urgent need of the appointment of a receiver for Manhattan who is familiar with the operating end of the elevated lines, and one who is independent, without connection with or domination by Interborough and/or Brooklyn-

> Manhattan Transit Company. Complainant believes that such independent receiver or receivers should be one well experienced in the operation of traction companies, as well as one thoroughly familiar with receiverships and reorganizations, and well grounded on finance and in the financial set up of Manhattan."

Deponent has not had and has not now any desire to be appointed to or continue in the office of Receiver of Manhattan Railway Company if, in the judgment of the Court having jurisdiction in the premises, anyone more highly qualified for the duties of that office might be secured, and he is content to leave the question of his qualifications and fitness for such office to the judgment of such Court. He states, however, that the allegations above quoted to the general effect that his conduct as Receiver will not insure independence of action or protection of creditors and security holders interested in the Manhattan Railway Company, and the imputation that he is connected with or dominated by Brooklyn-Manhattan Transit Company-Interborough interests are utterly without foundation and are refuted by deponent's entire course of conduct since the year 1922. The facts regarding deponent's connection with Manhattan Railway Company are as follows:

In 1922 the Interborough Rapid Transit Company was unable to discharge all of its obligations as they matured and a readjustment of the obligations of that company became necessary in order to avoid a receivership. A Plan of Readjustment was thereupon prepared and adopted under which certain changes were made in the obligations of the Interborough Company, including its obligations to the stockholders of Manhattan Railway Company under a lease of its properties made in 1903 by the Manhattan Railway Company to the Interborough Rapid Transit Company for a long term of years. The

law firm of which deponent was then a member acted as counsel for the committee which represented the stock of the Manhattan Railway Company in the negotiation, preparation and adoption of the Plan of Readjustment. Upon the completion of the Plan, the leading stockholders of Manhattan Railway Company, who held no shares of stock in, and were not even remotely connected or identified with, the Brooklyn-Manhattan Transit Company or the Interborough Company, suggested that deponent's firm which had acted as counsel for the stock committee should continue to act as counsel for Manhattan Railway Company and that deponent should become a member of the Board of Directors of the Company and act as its President.

Deponent was thereupon in the year 1923 elected a member of the Board of Directors of Manhattan Railway Company and President of the Company. Deponent had not at the time of his said election, or prior thereto, any connection with either the Brooklyn-Manhattan Transit Company or the Interborough Rapid Transit Company, and has had none since, except that from about the year 1924 to some time in the year 1931, he was one of the three representatives selected by the Manhattan Company to the Board of Directors of the Interborough Company under the provisions of the Plan of Readjustment hereafter mentioned. He is not and never had been the owner, or otherwise interested in, any securities of the Brooklyn-Manhattan Transit Company or the Interborough Rapid Transit Company. Deponent has never acted otherwise than solely and exclusively in the interest of Manhattan Railway Company and of the holders of its securities.

Deponent does not know of any sponsoring of his appointment as Receiver by anyone and believes that his appointment was made solely for the reason that ten years of service as President of the Manhattan Company

had given him a thorough knowledge of the very complicated problems affecting that Company, which would be most important in the administration of such a trust, and that his record was such as to assure the greatest possible protection of the interests of the Manhattan Company in dealing with the questions arising out of its relations with the Interborough Company. * * *

In paragraph "24-b" of the complaint complainant Johnson alleges:

> "Upon information and belief, as several of the directors of Interborough are also directors of Manhattan, and as heretofore alleged, three of the directors of Interborough constitute three of the four members of the Executive Committee of Manhattan; that the interests of these directors are conflicting and that it is impossible for such directors, particularly those controlling the executive committee of Manhattan to act independently and adequately and fully to protect the rights of Manhattan as against Interborough when acting in such dual position; * * *"

Deponent states the facts to be as follows:

Eighteen directors compose the entire Board of Directors of Interborough Rapid Transit Company, and thirteen directors compose the entire Board of Directors of Manhattan Railway Company. In view of the fact that the Plan of Readjustment made in 1922 affected the bonds of the Interborough Company, through the postponement for five years of the sinking fund on such bonds, and also affected the stock of the Manhattan Company in that the rate of dividend rental on the stock which assented to the Plan of Readjustment was reduced and made dependent upon earnings, the following provision was made in Article V of the Memorandum of Definitive Provisions, which supplemented the Plan of Readjustment:

"The number of directors of the Interborough Company shall be increased from fifteen to eighteen, to be divided into three equal classes so that six directors shall be elected each year for a term of three years. Nine of said directors shall be elected by the Interborough Company's stockholders, or upon nomination of the holders of Voting Trust Certificates therefor, and the other nine shall be elected by, or upon the nomination of, the following:

(a) By the Transit Commission of the State of New York and/or the Board of Estimate and Apportionment of the City of New York (or by any other commission, board or officer in which the powers of the Transit Commission or the Board of Estimate and Apportionment shall hereafter be vested by law), as and in such manner as may be determined by said Transit Commission.

3 directors.

(b) By the Manhattan Company in such manner as shall from time to time be provided in its by-laws or, if there shall be no by-laws in force regulating such election, by its board of directors.

3 directors.

(c) By registered holders of the Interborough Company's First and Refunding Mortgage Bonds.

3 directors."

Under the foregoing provisions of the Plan, as supplemented, the Manhattan Railway Company had the right to nominate three out of the eighteen directors of Interborough Company, but in no event had the Interborough Company the right to nominate directors to the Board of the Manhattan Company. Aside from the three representatives which the Manhattan Company appointed to the Board of Directors of the Interborough Company under the Plan aforesaid, the only person who is or has

been a director of both the Interborough Company and the Manhattan Company is Mr. Charles Hayden.

In the supplemental bill of complaint filed herein, complainant alleges (paragraph 11) that Manhattan Railway Company has been under domination and control of Interborough Rapid Transit Company ever since it took over the properties of the Manhattan Company in 1903.

Deponent has been familiar with the affairs of the Manhattan Railway Company since 1922, and states of his own knowledge that since that date at least it has not in any way or to any extent been dominated or controlled by the Interborough Company, but that, on the contrary, the Manhattan Company has always acted independently of the Interborough Company, and, whenever necessary to enforce rights of the Manhattan Company, has acted in opposition to the Interborough Company.

Complainant further alleges in the supplemental bill (paragraph 11) that, despite the protests of the holders of the modified stock of the Manhattan Company that sufficient earnings have been made to pay dividends to them during the past few years, no accounting has ever been procured from the Interborough Company by the directors of the Manhattan Company for the purpose of ascertaining the exact status of operations of the lines of the Manhattan Company, although the lease of the Manhattan Company provides that it may employ accountants at the expense of the Interborough Company to ascertain the earnings from the lines of the Manhattan Company. Deponent states the facts to be as follows:

After the Plan of Readjustment became effective the Board of Directors of the Manhattan Company first employed engineers of its own selection and at its expense to make monthly reports to the Board of Directors of the Manhattan Company of the net earnings of the Interborough System and of the earnings of the elevated

properties, operated by the Interborough Company; also employed accountants to make similar monthly reports independently of the engineers. Copies of such reports were sent monthly to each of the directors of the Manhattan Company.

The dividend rental on the stock of the Manhattan Company which had not assented to the Plan of Readjustment was paid in full, up to but excluding October 1, 1932, and the maximum dividend rental payable on the assenting stock was paid up to July 1, 1928. One of the principal causes of the discontinuance of the payment of dividend rental on the assenting stock was the settlement in August, 1929, by the City of New York and the Interborough Company of the dispute concerning the accounts under the subway contract between the City and the Interborough Company (Contract No. 3); the City contended that for many years the Interborough Company had improperly charged against subway revenue various substantial amounts, and that, if the amounts were accurately stated, the accumulated unpaid preferential payable to the Interborough Company under the subway contract had been extinguished. This accumulated unpaid preferential was the source from which payments had been made out of subway income on the dividend rental on the assenting stock. The Manhattan Company had not participated in the settlement of these accounts by the City and the Interborough Company. The accountants of the Manhattan Company took up promptly the investigation of this settlement and the other matters bearing upon the question whether there were any net earnings under the Plan of Readjustment applicable to the assenting stock after July 1, 1928. After investigation of these items and numerous conferences with the officers and employees of the Interborough Company the accountant of the Manhattan Company filed a written report in April, 1932, in which he concluded that a substantial amount of net earnings under the Plan of Readjustment

applicable to the dividend rental on the assenting stock had not been so applied. The Board of Directors of the Manhattan Company at a meeting held on June 16, 1932, adopted a resolution in which they declared that they were dissatisfied with the accounting methods of the Interborough Company under the Plan of Readjustment for the period from July 1, 1928, and on June 22, 1932, notified the Interborough Company of such dissatisfaction, and requested that independent certified public accountants be called in, at the expense of the Interborough Company, to examine its accounts for the period from July 1, 1928, in accordance with the provision of the Plan of Readjustment.

Complainant alleges in the supplemental bill (paragraph 11) that the members of the Executive Committee of Manhattan Railway Company, so far as is known, have taken no steps whatever to protect the Manhattan Company from the default under its First Mortgage caused by the Interborough Company's failure to pay the taxes payable in May 1932 on the special franchise and real estate of the Manhattan Company.

Deponent denies this allegation and states the facts to be as follows:

The taxes referred to in the supplemental bill of complaint are the special franchise and real estate taxes payable on May 31, 1932. When deponent was first informed that these taxes had not been paid he immediately caused a meeting of the Board of Directors of the Manhattan Company to be called. The meeting was held on June 16, 1932, at which a resolution was adopted that Manhattan Railway Company promptly notify the Interborough Company, as lessee, in writing that the real estate and special franchise taxes had not been paid, and demand that the Interborough Company pay such taxes promptly in accordance with the covenants contained in the lease, or deposit the amount of such taxes with a bank or trust company as provided in the Plan of Read-

justment. Such written demand was served by the Manhattan Company on the Interborough Company on June 24, 1932.

Complainant further alleges in the supplemental bill (paragraph 11) that Manhattan stations and properties are dilapidated in appearance compared with stations and platforms and properties of the Interborough Company, and that there is a specific duty imposed upon the Interborough Company under the lease with the Manhattan Company to keep the properties in good condition and repair, that the officers and directors of the Manhattan Company have failed to compel Interborough Company to carry out these provisions of the lease.

As to this matter, deponent avers that in August, 1932, the Board of Directors of Manhattan Railway Company passed a resolution declaring that they were dissatisfied with the maintenance of the properties of the Manhattan Company and calling upon the Interborough Company to join in selecting engineers as provided in the Plan of Readjustment, to determine the amount by which the Interborough Company had failed to maintain the properties of the Manhattan Company. Written demand to this effect was served upon the Interborough Company on August 24, 1932.

Deponent had no knowledge or intimation that a receivership of the Interborough Company was contemplated until after the appointment of the Receivers therefor on August 26, 1932.

WILLIAM ROBERTS.

Sworn to before me, this
6th day of October, 1932.
DAVID M. KEEBLE
Notary Public
New York County Clerk's No. 417
New York Co. Register's No. 3K599
Commission expires March 30, 1933.
(SEAL)

**Affidavit of William Roberts.**

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

*against*

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

WILLIAM ROBERTS, being duly sworn, deposes and says:

Deponent makes this additional affidavit in answer to certain statements made in a supplemental petition verified by complainant's counsel and first served in the Court Room on the argument of the order to show cause herein.

2026 *Affidavit of William Roberts.*

In this supplemental petition it is alleged, on information and belief, that deponent knew long in advance of the filing of the application for receivership of the Interborough Rapid Transit Company and the subsequent application for the receivership of Manhattan Railway Company that the same were brought about pursuant to an understanding or conspiracy of which deponent had knowledge.

Deponent denies the truth of these allegations and repeats the statement in his original affidavit, verified October 6, 1932, that he "had no knowledge or intimation that
2027 a receivership of the Interborough Company was contemplated until after the appointment of the Receivers therefor on August 26, 1932". Deponent knew of the maturities of Interborough obligations on September 1, 1932, but believed that arrangements would be made by Interborough Rapid Transit Company for taking care of these maturities. He had no information which would have led him to believe that a receivership was imminent or in contemplation. Deponent went to his summer home in Maine a few days prior to August 26th and was surprised to receive on that day a telegram from his New York office stating that Receivers for the Interborough Company had been appointed.

2028 In the said supplemental petition petitioner suggests as a reason for his alleged belief that deponent knew of the alleged conspiracy that deponent, in April, 1932, presented to Manhattan Railway Company a bill for $60,000 or thereabouts for professional services alleged to have been rendered to said company for a period of three years prior thereto, and that such payment was authorized, although it virtually exhausted the entire cash in the treasury of the company. Deponent denies the implications sought to be drawn from these transactions and states the facts to be as follows:

When deponent became President of the Manhattan Railway Company in 1923, it was arranged that his salary should be at the rate of only $6,000 a year, but it was further understood that deponent should be entitled to receive additional compensation for legal services rendered to the company. Deponent was then a member of the firm of Murray, Prentice & Aldrich, later Murray, Aldrich & Roberts, which firm was counsel to the Manhattan Railway Company, as explained in deponent's original affidavit. After deponent's withdrawal from said firm, the same arrangement continued as to him personally. Deponent had rendered extensive and valuable legal services to the company for a period of three years prior to 1932, including the preparation of briefs and argument in the Appellate Division on the appeal in the proceedings for acquisition by condemnation of the elevated railroad spur on East 42nd Street, the consideration of numerous complicated legal questions relating to the net earnings of the Interborough Company and of the Manhattan Leased Lines under the plan of readjustment, and the examination of numerous valuation reports and consideration of various plans relating to proposed unification of transit systems in New York City. Deponent did not render bills year by year for these services solely for reasons of personal convenience. On March 25, 1932, deponent requested one of the directors of the Manhattan Company to call a meeting of the Executive Committee at which the compensation for deponent's legal services could be discussed. Deponent suggested that a fair charge would be at the rate of $20,000 a year, which he believes and avers was no more than fair and reasonable compensation for the legal services rendered, but stated that it was his desire to make a charge which would be satisfactory to the other members of the Board, especially in view of the limited cash resources

of the Manhattan Company. A meeting of the Executive Committee was held on April 7th, deponent not being present thereat, at which the total charge of $60,000 was unanimously approved and authorized and payment was made shortly thereafter. It did not virtually exhaust the entire cash in the treasury of the company but there remained in the treasury the sum of approximately $50,000. There is not normally any large amount in the treasury of the Manhattan Company. Under the lease, the Interborough Company paid all expenses of operation of the leased lines and was further obligated to pay as part of the rent the interest on the bonds and certain dividends upon the stock of Manhattan Company, besides all taxes. The Manhattan Company received annually under the lease the sum of $50,000 to cover administration expenses and this was substantially its only general revenue. At the time of this payment deponent had no intimation that instructions had been issued by the firm of J. P. Morgan & Company that there should be no payment by the Interborough Company of the sum of $860,000 which would become due to the City of New York for real estate and franchise taxes on the Manhattan Railway Company in May, 1932, as alleged in said supplemental petition, if such be the fact, nor had he any intimation that the Interborough Company intended to default on any other of its obligations or would be unable to meet its obligations. The payment to deponent, made pursuant to the authorization of the Executive Committee of the Manhattan Company in April, 1932, was ratified at the meeting of the Board of Directors on June 16, 1932, deponent not being present at the time that the matter of his compensation was discussed and voted upon.

With respect to the other allegations in said supplemental petition, deponent never heard that any stockholder contemplated a suit against him for misfeasance

or malfeasance in office as therein alleged and repeats the denials contained in his original affidavit of the allegations to the general effect that he has failed in his duty to promote the interest and welfare of Manhattan Railway Company, and that he is in any way under the domination or control of interests representing Brooklyn-Manhattan Transit Company or Interborough Rapid Transit Company.

WILLIAM ROBERTS

Sworn to before me this
8th day of October, 1932.
JAMES D. McCAULEY,
JAMES D. McCAULEY, Notary Public
Queens Co. Clerk's No. 2548, Reg. No. 7579
Cert's filed N. Y. Co. Clk's No. 273, Reg. No. 3Mc179
Cert's filed Kings Co. Clk's No. 27, Reg. No. 3088
Cert's filed Bronx Co. Clk's No. 15, Reg. No. 42Mc33
Commission expires March 30th, 1933.

2038 **Affidavit of Charles Franklin.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

*against*

MANHATTAN RAILWAY COMPANY, subject to leave of court WILLIAM
2039 ROBERTS, as Temporary Receiver of Manhattan Railway Company, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY
E 71-153—1932.

2040 STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

CHARLES FRANKLIN, being duly sworn, deposes and says:

I am the solicitor for the complainant herein.

I have been a stockholder of the defendant, Manhattan Railway Company, for the past twenty years, and am now the owner of three thousand shares of its stock. I have read the affidavit of Louis Boehm, annexed hereto.

I was likewise informed, through a third person, of the fact that a bill had been filed in the Barber case for

the appointment of a receiver of Manhattan. I received this information a day or two before the return day of the order to show cause. In view of my large stockholdings, and of the still larger interests that I represent, I appeared on the return day of the order to show cause. When we were ushered into Judge Manton's chambers, we were informed by Judge Manton that he had already signed an ex parte order permitting Manhattan to intervene in the American Brake Shoe case, and had already signed an ex parte order appointing William Roberts receiver of Manhattan. He handed us a law book which he said contained a case which authorized this procedure. Although the bill in the Barber case had been filed before the Manhattan intervention petition, Judge Manton did not even grant counsel an opportunity to be heard before granting ex parte Manhattan's application in the American Brake Shoe case, and appointing William Roberts as receiver.

I had nothing whatever to do with the preparation or filing of the bill in the Barber case. I did not know it had been filed until a couple of days before the order to show cause was returnable. I was not even acquainted with Lawrence Berenson until a few days before the return day of the motion. I am quite sure that I did not refer, in the conference before Judge Manton, to the Barber bill as "our" bill. As I am informed, what was said at this conference was not taken down by an official stenographer of this court, but by a private stenographer employed by one of the defendants in the American Brake Shoe case. I could not have referred to the Barber bill as "our" bill because, as a matter of fact, it was not "our" bill. I was not the solicitor for the complainant, and had nothing to do with its preparation. Said bill was in no way instigated by the so-called Amster Committee.

I have read the affidavit of William Roberts, submitted upon this motion. Without attempting to reply

thereto in detail, which I consider unnecessary, I would like to point out to the court merely that it was a notorious fact, known to every patron of the Elevated railroad system, that for the past ten years the property had been under maintained, and permitted to become dilapidated and antiquated. This had much to do with the falling off in traffic on these lines. According to Mr. Roberts' own affidavit, it was not until August, 1932, the same month in which the receivers of Interborough were appointed, that the Manhattan directors passed a resolution that they were dissatisfied with the maintenance of its proper-
2045 ties, and called upon the Interborough to join in selecting engineers to determine the amount by which the Interborough had failed to maintain Manhattan's properties. This demand was not served, according to his own affidavit, until August 24, 1932, the day before Judge Manton made the order designating himself to hear the application for the appointment of a receiver. This application was made upon elaborate printed papers, verified on August 25, 1932, and no doubt prepared some days in advance. It is perfectly apparent that this constituted merely a belated attempt by Mr. Roberts, and the other Manhattan directors, to save themselves against liability in a possible stockholders' suit for neglect of their duties
2046 as directors of Manhattan.

As I am informed by one of the directors of Manhattan, and verily believe, at a meeting of the Board of Directors of Manhattan, held in and about the month of April, 1932, it was stated that instructions had been issued by the bankers for Interborough that the real estate and franchise taxes of Manhattan, due on May 1, 1932, amounting to $860,000, should not be paid, although at the time the Interborough had in its treasury approximately $5,000,000, and was well able to pay the same. No action was taken by Mr. Roberts, according to his own affidavit, in connection with the payment of these taxes, except to make a demand on June 24, 1932, that

such taxes should be paid. There is no claim that any steps were taken by Mr. Roberts to compel this payment, as provided by the terms of the lease.

Although the modified guaranteed stockholders of Manhattan have received no dividends since July 1, 1928, according to Mr. Roberts' own affidavit, it was not until June 16, 1932, about four years later, that a resolution was passed by the Manhattan directors that they were dissatisfied with the accounting methods of the Interborough, and requesting that independent accountants be called in to examine its accounts, as provided by the lease.

I respectfully submit that Mr. Roberts, upon his own affidavit, has shown his complete and indefensible neglect of the interests of Manhattan, and its stockholders.

Just as Mr. Boehm assumed that Judge Manton had jurisdiction to appoint the Interborough receivers, so did I likewise make that assumption. It was not until after Judge Manton had, ex parte, signed the order for the appointment of Mr. Roberts as receiver in the American Brake Shoe case before he even heard counsel upon the application in the Barber case, that I began to look into the question of how this case happened to come on before Judge Manton, and then discovered the existence of the two orders now under attack.

(Signed) CHARLES FRANKLIN.

Sworn to before me this 8th day of October, 1932.

LLEWELLYN HERNLY
Notary Public, Queens County,
Queens Co. Clks. No. 2151, Queens Cty. Reg. No. 2117
N. Y. Cty. Clks. No. 672, N. Y. Cty. Reg. No. 4M387
Commission expires March 30, 1934.

## Affidavit of Louis Boehm.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

*against*

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY
E 71-153-1932.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LOUIS BOEHM, being duly sworn, deposes and says:

I am of counsel for the complainant, and for the intervenor, LILLIAN BOEHM.

I have read the affidavit of J. Osgood Nichols, verified October 5th, 1932, submitted in opposition to this motion. I have also read the brief submitted in behalf of the de-

fendant, American Brake Shoe and Foundry Company. In view of the statements contained in Mr. Nichols' affidavit and the inferences sought to be drawn in the brief, I think it proper that I should state to the Court my connection with the subject matter of this litigation. For a number of years I have been an owner of securities of the Manhattan Railway Company, and for more than a year and a half last past, my wife, Lillian Boehm, and I, have been owners of the securities of the defendant Manhattan and the defendant Interborough, having a par value of $372,000. All of these securities were purchased at prices greatly exceeding their present market value, in some instances many times their present market value. With such a large investment, I was naturally very much concerned in the affairs and welfare of both of these companies.

While I was in the country on my vacation in the latter part of August, I read in the newspapers that, upon an ex parte application, and without notice to other security holders, Judge Manton, upon the claim of the American Brake Shoe and Foundry Company for $27,000., had appointed receivers of the Interborough Rapid Transit Company, owing to the alleged inability of the Company to secure extensions of time of payment of its notes due on September 1st, and October 1st, respectively. Incidentally, I might state that nobody had ever asked Mrs. Boehm or myself for an extension. Upon my return to the City, I learned from a third person that one, Harry Barber, acting through Lawrence Berenson, his attorney, had filed a bill of complaint in this Court, and had made application for the appointment of a receiver of the Manhattan Railway Company, returnable on September 6th, 1932. I received this information a few days before the return day of said motion. Up to that time, I had not been acquainted with Harry Barber or with Lawrence Berenson, and, so far as I can recall,

had never even heard of them. I appeared on the return day of said order to show cause for the purpose of protecting our very substantial investment in these companies. I am familiar, in a general way, with the affairs of these two rapid transit corporations, and had kept in fairly close touch with the negotiations in connection with the proposed transit unification in the City of New York, and had felt for some time that, in the course of these negotiations, the interests of both the Interborough and the Manhattan had been subordinated to the interests of the Brooklyn-Manhattan Transit Corporation, and that Mr. Gerhard M. Dahl, the Chairman of the Board of Brooklyn-Manhattan Transit Corporation, who was likewise the Chairman of the Board of the Interborough Rapid Transit Company had, in the course of those negotiations, sacrificed the interest of the Interborough and of Manhattan in an attempt to obtain unduly favorable terms for the Brooklyn-Manhattan Transit Corporation. I refer particularly to the failure of the transit unification negotiations which were then conducted between Mr. Samuel Untermeyer, as special counsel for the Transit Commission, and Mr. Dahl, after a price of approximately $500,000,000. had been agreed upon for the properties of the Interborough, Manhattan, and B. M. T., over a difference of approximately $8,000,000. or $10,000,000. of debts or obligations of the B. M. T., which Mr. Dahl insisted would have to be assumed by the City before any deal could be made. As the result of this demand, insignificant in comparison to the total amount involved, the negotiations fell through, and the market value of the securities of the Interborough and the Manhattan greatly depreciated. In view of this situation, I felt that the domination exercised by the B. M. T. interests over the Interborough and Manhattan properties was injurious to these properties, and contrary to the best interests of the security holders of Interborough and Manhattan. In ad-

dition to that, I had become well aware, as indeed it was a matter of common knowledge, that the interests of Manhattan had never been adequately protected by its Board of Directors; that, although the lease between Interborough and Manhattan provided that the railroad, stations, rolling stock, and equipment should be maintained by the Interborough in first-class condition, the same had been allowed to deteriorate and become antiquated, that its stations were unsightly and smelly, that its cars were out of date and inadequate, and that the property of Manhattan had not been maintained as provided by the terms of the lease. I was also aware that no account had ever been given by Interborough to Manhattan stockholders showing the earnings of the Manhattan property, separate and apart from the unprofitable extensions which the Interborough had added on to their lines. In the Interborough reports the earnings are given merely of the "Elevated Division", and included, not only the lines of Manhattan, but also such unprofitable extensions; this, in spite of the fact that the lease provided that Manhattan could hire independent auditors at the expense of Interborough to examine Interborough's accounts. Under those conditions, I felt impelled to attend on the return day of the Barber order to show cause, in an effort to have independent receivers appointed for Manhattan who would vigilantly protect its interests and not neglect them, or permit them to be subordinated to those of Interborough or B. M. T. I assumed, of course, that Judge Manton had jurisdiction of the case, and never dreamed that he would undertake to appoint receivers of a vast property like the Interborough unless he had jurisdiction to do so. When we were ushered into Judge Manton's Chambers, Judge Manton informed us that he had signed an ex parte order permitting the Manhattan Railway Company to intervene in the American Brake Shoe case against the Interborough, and that he had likewise just

signed, ex parte, an order appointing William Roberts, the President, director and counsel for Manhattan, as Receiver. I thereupon objected to the appointment of Mr. Roberts who, as President, director and counsel of the Company, was perhaps chiefly responsible for the failure of the Company to protect its interests, to have the Interborough keep up and maintain its properties, and for the failure of Manhattan to be in any way represented in the transit unification negotiations. Mr. Roberts, however, had already been appointed before Judge Manton had even heard counsel in the Barber case upon the motion for appointment of a receiver, and, so far as I know, without consultation with any of the security holders of Manhattan. Under the circumstances, my protest against the appointment of Mr. Roberts, which had already been made, was perfectly futile, and of no avail.

Thereafter, I consulted with Mr. Franklin, as the counsel for very large interests in the Manhattan Company, as to how we could protect our respective interests, and we thereupon, for the first time, made an examination into the question as to how Judge Manton came to be sitting in this case, and as to whether or not he had jurisdiction of the case at all. As a result of that examination, we discovered the existence of the two orders which Judge Manton had made on August 25th, 1932, in the first of which he designated himself to hold a term of the District Court, and in the second of which (filed August 26th, 1932), he stated his disagreement with the District Judges as to the division of business. We thereupon examined the Rules of this Court, and discovered that said orders, in our opinion, were in violation of Rules 1a and 11a of the General Rules of this Court. Mr. Franklin and I thereupon concluded that Judge Manton had no jurisdiction of the American Brake Shoe case, and no right to appoint receivers therein, and that

his action in so doing was void. Thereupon, Mr. Franklin commenced the Johnson action, in which I appear as counsel, for the purpose of obtaining a judicial determination of Judge Manton's lack of jurisdiction. Lillian Boehm, as a bondholder of Interborough, has intervened in that action and filed a supplemental bill praying that Judge Manton's order appointing receivers of the Interborough be vacated for lack of jurisdiction.

After the commencement of the Johnson action, of course, neither Mr. Franklin nor I took any further part in the proceedings had before Judge Manton in connection with the Interborough or Manhattan receiverships. Our position was that Judge Manton had no jurisdiction of the case, and that any orders that he might make would be null and void. To have appeared before him and argued on the merits of these applications, would have been entirely inconsistent, and would have made our position untenable.

In connection with the claim that Mr. Franklin, at the conference before Judge Manton, referred to the Barber bill as "our" bill, I desire to stae that I was present throughout this conference, and, to the best of my recollection, Mr. Franklin in the course of that conference never referred to the Barber bill as "our" bill. My recollection is corroborated by a stenographic transcript of a lengthy discussion that occurred between Mr. Arthur Berenson, a stockholder of Manhattan, and Judge Manton, which covered six pages of the transcript. This discussion was entirely between Judge Manton and Mr. Arthur Berenson. In the middle of that discecussion, Mr. Arthur Berenson made the following statements, erroneously imputed, in the transcript, to Mr. Franklin:

> "It is a thing that alarmed us very much, and caused our bill to be filed. We could not come in here as intervenors because we represented only stockholders, and we think under the principles

068 *Affidavit of Louis Boehm.*

laid down in the famous case of Harkin against Brundage where receivers are asked for in behalf of a petitioner in one court and an application made there that if the receivers should be appointed they should be appointed on the petition which comes before the Court first. If this bill had been filed in the state court, for example, and a petition for the appointment of a receiver."

I particularly recall that it was Mr. Berenson who made this statement because it was he who referred to the famous case of Harkin *v.* Brundage, and not Mr. Frank-
069 lin.

LOUIS BOEHM

Sworn to before me this)
8th day of October, 1932.(
MAY HERSHEY Notary Public
Bronx Co. Cl'k No. 201 Reg. No. 228H33
N. Y. Co. Cl'k No. 1145 Reg. No. 3H737
Kings Co. Cl'k No. 116 Reg. No. 3381
Commission expires March 30, 1933

070

## Stipulation Extending Interborough Receivers' Time to Answer.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,

*against*

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, that the time of Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company to appear specially to contest the jurisdiction of this Court, or to answer, plead, or otherwise move with reference to

2074 *Stipulation Extending Interborough Receivers' Time to Answer.*

the complaint herein, be and the same is hereby extended to and including the 18th day of October, 1932.

Dated, New York, N. Y., October 10, 1932.

CHARLES FRANKLIN,
Attorney for Complainant.

CHADBOURNE, STANCHFIELD & LEVY,
Attorneys for Victor J. Dowling
and Thomas E. Murray, Jr., ap-
2075 pearing specially and without
submitting to the jurisdiction of
this Court in this cause.

So Ordered 10/11/32.

WOOLSEY
U. S. D. J.

2076

## Stipulation Extending Manhattan Receiver's Time to Answer.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

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|---|---|
| BENJAMIN F. JOHNSON, Complainant, *against* MANHATTAN RAILWAY COMPANY, subject to leave of court WILLIAM ROBERTS as Temporary Receiver of MANHATTAN RAILWAY COMPANY, *et al.*, Defendants. | IN EQUITY E-71-153 |

It is hereby stipulated that the time of the defendant, WILLIAM ROBERTS, as temporary receiver of Manhattan Railway Company, to appear, answer or otherwise move to the bill of complaint herein, be and the same hereby is extended to and including October 18, 1932.

Dated: New York, October 10, 1932.

CHARLES FRANKLIN
Solicitor for complainant.
per L. W. S.

C. W. So ordered. October 11, 1932.
WOOLSEY,
U. S. D. J.

(Rubber stamp on reverse)
UNITED STATES DISTRICT COURT
Filed October 13, 1932.
S. D. of N. Y.

2080

## Opinion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

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| BENJAMIN F. JOHNSON, Complainant, *v.* MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of 2081 MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Defendants. | IN EQUITY No. 71-153. |

2082 On three orders to show cause, which are brought by the complainant, and an intervening petitioner in the above entitled cause—Equity 71-153—in which all the parties to Equity cause No. 70-364—*The American Brake Shoe and Foundry Company* v. *Interborough Rapid Transit Company, Manhattan Railway Company*, Intervenor,—together with the receivers appointed in that cause, are made parties defendant, with leave of this court as to said receivers, asking relief which may be thus conveniently summarized:

1. To have vacated and set aside as void two orders dated August 25, 1932, made by Judge Manton, Senior Circuit Judge of this Circuit, the first of which desig-

nated himself to hold a District Court in this District for the purpose of hearing applications and proceedings in the cause of the *American Brake Shoe and Foundry Company* vs. *Interborough Rapid Transit Company*, which later, after it was filed in this Court on August 26, 1932, was given Equity number 70-364 on the Equity Docket; and by the second of which Judge Manton purported to make a change in the division of the business in the District Court and to appoint himself, in addition to the motion judge, to hear application for the appointment of receivers in equity causes in the motion part wherein only such applications can be made under Rule 11-a of the General Rules of this Court.

2. To vacate and set aside as void orders subsequently made by Judge Manton in this Court by which he appointed receivers and counsel for the Interborough Rapid Transit Company and the Manhattan Railway Company.

3. To have new receivers appointed by this Court both for the Interborough Rapid Transit Company and the Manhattan Railway Company.

4. To have the orders to show cause heard by the eight District Judges of the Southern District of New York sitting *en banc*.

5. And such other and further relief as might seem just and proper to this Court.

CHARLES FRANKLIN, ESQ., solicitor for complainant
LOUIS BOEHM, ESQ., solicitor and counsel for Lillian Boehm, intervenor
LLOYD PAUL STRYKER, ESQ., solicitor and counsel for holders of the Ten-year 6% Gold Notes Committee of Interborough Rapid Transit Company
MESSRS. BREED, ABBOTT & MORGAN, solicitors for The American Brake Shoe and Foundry Company, complainant—Charles H. Tuttle, Esq., W. K. Pettigrue, Esq. and Paris S. Russell, Esq., of counsel

MESSRS. HUGHES, SCHURMAN & DWIGHT, solicitors for William Roberts, Receiver of the Manhattan Railway Company—Charles E. Hughes, Jr., Esq. and Allen S. Hubbard, Esq., of counsel

MESSRS. CHADBOURNE, STANCHFIELD & LEVY, solicitors for the Receivers of the Interborough Rapid Transit Company, (Messrs. Dowling and Murray)—William D. Guthrie, Esq., William Wallace, Esq., of counsel

JAMES L. QUACKENBUSH, ESQ., solicitor for the Interborough Rapid Transit Company

ARTHUR J. W. HILLY, ESQ., Corporation Counsel of the City of New York—F. E. Garstarphen, Esq., Edgar J. Kohler, Esq. and Harry Hertzoff, Esq., of counsel

MESSRS. COTTON, FRANKLIN, WRIGHT & GORDON, solicitors for Protective Committee of Manhattan Consolidated 4's—Clifton Murphy, Esq. and B. C. Wright, Esq., of counsel

LAWRENCE BERENSON, ESQ., solicitor for complainant in an action entitled Barber *v.* Manhattan Elevated R. R. Co., the Interborough Rapid Transit Company and the Receivers of the Interborough Rapid Transit Company

MESSRS. DILLS, MUECKE & SHOLKER, solicitors for Manhattan Railway Company—Jack J. Lawrence, Esq., of counsel

ELON S. HOBBS, ESQ., solicitor for Independent Security Holders who have not filed their securities with the Protective Committee, but have filed a petition

LOUIS B. WHELE, ESQ., solicitor for the Guaranteed Stockholders Committee — Norman Johnson, Esq., of counsel

MESSRS. DAVIS, POLK, WARDWELL, GARDINER & REED, solicitors for the 7% Noteholders' Committee and 5% Bondholders' Committee, both Committees of Interborough Rapid Transit Company securities—Edwin S. S. Sunderland, Esq., of counsel

JOHN J. CURTIN, ESQ., appearing specially for the Transit Commission—George H. Stover, Esq., of counsel

MESSRS. DAVIES, AUERBACH & CORNELL, solicitors for Central Hanover Bank & Trust Company—Harold C. McCollom, Esq., of counsel

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The following members of the Bar appeared on the argument of these motions and submitted oral arguments or briefs therein:

CHARLES FRANKLIN, ESQ. and LOUIS BOEHM, ESQ., on behalf of the complainant in Equity 71-153, and Lillian Boehm, intervenor therein, of counsel in behalf of such intervenor

WILLIAM D. GUTHRIE, ESQ., WILLIAM WALLACE, ESQ., of counsel for the Receivers of the Interborough Rapid Transit Company

CHARLES E. HUGHES, JR., ESQ. and ALLEN S. HUBBARD, ESQ., of counsel for William Roberts, Esq., receiver of the Manhattan Railway Company

CHARLES H. TUTTLE, ESQ., WILLIAM K. PETTIGRUE, ESQ. and PARIS S. RUSSELL, ESQ., of counsel for the American Brake Shoe and Foundry Company, complainant in Equity 70-364

LLOYD P. STRYKER, ESQ., of counsel for a Committee of Noteholders of the Ten-Year 6% Gold Notes of the Interborough Rapid Transit Company

ELON S. HOBBS, ESQ., pro se and representing independent holders of securities

EDWIN S. S. SUNDERLAND, ESQ., of counsel for Seven Per Cent Noteholders Committee and 5% Bondholders Securities

HAROLD C. MCCOLLOM, ESQ., of counsel for the Central Hanover Bank & Trust Company

WOOLSEY, J.:

These motions are granted to the extent here indicated:

*A.* (1) The counsel for the moving parties may present to me for signature an order providing for the consolidation of the cause of *American Brake Shoe and*

*Foundry Company* v. *Interborough Rapid Transit Company, Manhattan Railway Company, Intervenor,*—Equity No. 70-364—with this cause of *Johnson* v. *Manhattan Railway Company,*—Equity No. 71-153.

(2) After the order of consolidation thus granted is signed and filed, counsel for the moving parties may present to me for signature a further order providing that all the orders made by Judge Manton in this Court, in the cause of *American Brake Shoe and Foundry Company* v. *Interborough Rapid Transit Company, Manhattan Railway Company, Intervenor,*—Equity No. 70-364—dealing both with the Interborough Rapid Transit Company and the Manhattan Railway Company, be vacated and set aside as wholly void and of no juridical effect.

The order which I am asked to sign must, however, contain a provision that its operation is suspended for a period of twenty days to enable the defendants herein to appeal from this decision if they are so advised.

*B.* (1) I deny the motions, without prejudice, in so far as they request the appointment of new receivers at the present time; but if no appeal is taken within twenty days, or, if, after the decision in such appeal as may be taken within that time, my decision is affirmed, a new application for such appointment may be made, in pursuance of General Rule 11-a of this Court, to the Judge at that time assigned to hold the Bankruptcy and Motion part of the business of this Court.

(2) I deny, for want of jurisdiction, these motions in so far as they request me to vacate the orders made and signed on August 25, 1932, by Judge Manton as Senior Circuit Judge, because I can only deal with the effect of these orders in this Court. This I have hereinafter done.

(3) I have already denied the application of the petitioners to have these motions heard by the eight Judges of the District Court sitting *en banc.*

I. This proceeding involves important questions of Federal Court administration which are, I believe, of first impression. The validity and effect of Orders of Designation and Division of Business made by Honorable Martin T. Manton, as the Senior Circuit Judge of the Circuit Court of Appeals for this Circuit, are challenged by the plaintiffs.

It may be appropriate,—although it should be unnecessary—to remark *in limine* that the situation out of which this challenge arises was not created or contributed to in any way by the United States District Court for the Southern District of New York or by any Judge thereof.

II. As a preface to the statement of the facts I think it would be helpful to express my views as to the relation between the Circuit Court of Appeals and the District Court under the Judicial Code now contained in Title 28 of the United States Code, for that will give a background against which the facts must be seen and the appropriateness of the relief sought by the complainant determined.

Section 18 of the Judicial Code (Title 28, United States Code, Section 22) provides under the heading "*Circuit Judge designated to hold District Court—Powers*", *inter alia:*

> "The Chief Justice of the United States or the Circuit Justice of any Judicial Circuit or the Senior Circuit Judge thereof, may, if the public interest requires, designate and assign any Circuit Judge of a Judicial Circuit to hold a District Court within such circuit."

Section 118 of the Judicial Code (Title 28, United States Code, Section 213) deals with Circuit Judges, and, after prescribing their number in each circuit and their appellate duties, provides, *inter alia:*

98

> "Nothing in this section shall be construed to prevent any Circuit Judge holding District Court or otherwise, as provided by other sections of the Judicial Code."

Section 120 of the Judicial Code (Title 28, United States Code, Section 216) deals with the judges who may sit in the Circuit Court of Appeals and provides that the District Judges may sit in that Court when enough Appellate Judges are not available.

In addition to the provisions cited, there are also
99 the provisions contained in Title 28, United States Code, Section 47, and in Title 28, United States Code, Section 380, involving, respectively, suits challenging orders of the Interstate Commerce Commission and suits in which it is alleged that a State statute is unconstitutional and providing for the convening of a three judge court, containing at least one Circuit Judge, to hear such causes.

It is observable, however, by reading the provisions of Title 28, United States Code—Judicial Code and Judiciary—that, although by the provisions above mentioned, the organization of the Federal Courts is made very plastic, so far as the use of their judicial personnel is concerned, the District Courts and the Circuit Courts
100 of Appeals are distinct Courts; that the former are the only instance Courts, and that the latter have appellate jurisdiction only.

Each Court has, of course, its own intra-mutal administrative problems arising in connection with the arrangement and despatch of the business which comes before it. When the District Court is functioning within its lawful ambit, these problems constitute what I may, perhaps, properly call its domestic economy, and are solely its own concern.

Control over its business is an inherent right of any body of judges which constitutes a Court. If those Judges are going to function at their best, they must,

within the law, be masters in their own house; for the wisest outsider, it may safely be assumed, cannot possibly be so aware of the problems which face them as are the judges who are carrying the heavy responsibility of doing the Court's business from day to day.

This obvious fact is explicitly recognized by Title 28, United States Code, Section 731, which gives the District Court power to make rules of practice, and implicitly recognized also, by Section 23, of the Judicial Code, Title 28, United States Code, Section 27, which provides that in districts having more than one District Judge, the District Judges may agree on the division of business for the District, and allows the intervention of the Senior Circuit Judge only when the several District Judges in the District are unable to agree on the division of business therein. In such event, the aid of the Senior Circuit Judge is invoked under Section 23 of the Judicial Code, as an outsider, who by statute may be called on by the District Court as a peacemaker between its Judges.

III. The facts, so far as they are relevant in connection with these proceedings, are as follows:

On June 29, 1932, a schedule entitled—

> "Assignment of judges and division of work of the United States District Court for the Southern District of New York for the months of July, August and September, 1932,"

signed by all the eight judges of the District Court, was filed in the Clerk's office thereof.

At the same time, on the same date, a schedule entitled—

> "Assignment of United States District Judges S. D. of N. Y. October 1932 to June 1933,"

showing the division of work in this Court for the Court year which was just begun. This also was signed by all the District Judges.

On June 30, 1932, the General Rules of this Court were revised by the addition thereto of two rules called Rule 1-a and Rule 11-a; and an appropriate order making the revision was entered in the Clerk's office on said date providing that the new rules should become effective on July 1, 1932. This order was signed by all the eight District Judges.

These rules were as follows:

> "1-a. Any judge designated to sit in the District Court for the Southern District of New York, shall do such work only as may be assigned to him by the Senior District Judge."
>
> "11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the bankruptcy rules), shall be made to the judge assigned to hold the bankruptcy and motion part of the business of the court and to no other judge."

By the assignment of the summer business, Judge Patterson was assigned to deal with bankruptcy and general motions between August 15, 1932 and August 29, 1932, inclusive.

On August 25th and August 26th, 1932, when the first receivership order was signed by Judge Manton, Judge Patterson was in Court or in his Chambers throughout the day ready to receive any applications for equity receiverships which might be made and functioning in all respects as a *de jure* judge in the part to which he was assigned.

On August 25th, Judge Manton in his capacity as Senior Circuit Judge of the Second Circuit signed two orders.

The first of these orders, for convenience herein referred to as the "Designation Order", reads in full as follows:

"WHEREAS, the undersigned as Senior Circuit Judge of the Second Judicial Circuit of the United States, is empowered and authorized by law, pursuant to the provisions of Title 28, Sec. 22 of the Code of Laws of the United States of America, if the public interest so requires, to designate and assign any Circuit Judge of the Second Judicial Circuit to hold a District Court within such Circuit; and

WHEREAS, the undersigned, as such Senior Circuit Judge, finds that the public interest requires that Martin T. Manton, a Circuit Judge of the Second Judicial Circuit, be designated and assigned as a Circuit Judge of this Judicial Circuit to hold a District Court within such Circuit, it is hereby

ORDERED, ADJUDGED AND DECREED, that the said Martin T. Manton be and he hereby is designated and assigned to hold a District Court of the United States for the Southern District of New York, Second Judicial Circuit, during the period beginning August 25, 1932, and particularly to hear and determine all applications and proceedings in the matter entitled American Brake Shoe & Foundry Co. *vs.* Interborough Rapid Transit Company, and for such further time as may be required to complete unfinished business.

Dated; New York, August 25, 1932.

MARTIN T. MANTON
Senior Circuit Judge for the
Second Judicial Circuit."

The second of these orders, for convenience herein referred to as the "Division of Business Order," reads as follows:

*Opinion.*

"IN THE

## UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND JUDICIAL CIRCUIT.

| | |
|---|---|
| IN THE MATTER *of* the Division of Business and Assignment of Cases for Trial in the Southern District of New York. | ORDER. |

WHEREAS, Martin T. Manton has been duly designated and assigned to hold a District Court of the United States for the Southern District of New York within this Second Judicial Circuit for a period of thirty days from this day; and

WHEREAS, Section 23 of the Judicial Code (Mar. 3, 1919, c. 231, Sec. 23, 36 Stat. 1090) provides that 'In Districts having more than one district judge, the judges may agree upon a division of business and assignment of cases for trial in said district; but in case they do not so agree, the Senior Circuit Judge of the Circuit in which the district lies shall make all necessary orders for the division of business and the assignment of cases for trial in said District'; and

WHEREAS, Martin T. Manton, a Circuit Judge of the Second Judicial Circuit of the United States designated and assigned to hold a District Court in the Southern District of New York in said Circuit, and acting as District Judge for the Southern District of New York in this Second Judicial Circuit, does not agree upon the division of business and assignment of cases for trial in the Southern District of New York as provided in and pursuant to the rules of court for the Southern District of

New York heretofore adopted by the then United States District Judges for the Southern District of New York; it is hereby

ORDERED, ADJUDGED AND DECREED that, for a period of thirty days beginning with this day, all applications for the appointment of receivers in equity causes in the Southern District of New York may be made not only to the district judge designated to hear such applications pursuant to Rule 11-a of the General Rules of the District Court for the Southern District of New York, but also to Martin T. Manton, Circuit Judge designated to act as District Judge to hold a District Court for the Southern District of New York.

Dated, New York, August 25th, 1932.

MARTIN T. MANTON".

These orders were both filed in the District Court on August 26, 1932.

On August 26, 1932, a bill of complaint brought by the American Brake Shoe and Foundry Company, as a creditor against the Interborough Rapid Transit Company as defendant and asking for a receivership in equity on the ground that it was at the time in such a condition that it could not discharge its then existing or impending obligations and needed the protection of the Court.

On the same day the defendant filed an answer admitting all the allegations of the complaint and consenting to and joining in the request for the appointment of a receiver.

I am told by Judge Knox, who was here at the time, that Judge Manton did not apply to him under General Rule 1-a for an assignment, either on August 25th or August 26th. I am told by Judge Patterson that there was not any application made to him for a receivership order in the cause of *American Brake Shoe and Foundry Company* v. *The Interborough Rapid Transit Company,*

Equity No. 70-364, at any time on August 25th or August 26th.

On August 26th, Judge Manton made and signed an order appointing Victor J. Dowling, Esq. and Thomas E. Murray, Jr., Esq., temporary receivers of the Interborough Rapid Transit Company, and provided therein that all interested parties should, on September 22, 1932, show cause why the receivership should not be continued *pendente lite.*

On August 26th, 1932, an order was made by Judge Manton appointing Messrs. Chadbourne, Stanchfield &
117 Levy attorneys for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of the Interborough Rapid Transit Company.

On September 6, 1932, on petition of the Manhattan Railway Company, verified the second day of September, 1932, for an extension of the receivership to it, Judge Manton made an order appointing William Roberts, Esq. temporary receiver of the Manhattan Railway Company, with a provision for interested parties to show cause on September 22nd why the receivership should not be continued.

On September 7, 1932, an order was made by Judge Manton appointing Messrs. Hughes, Schurman & Dwight
118 attorneys for William Roberts, Receiver of the Manhattan Railway Company.

On September 22nd there was a hearing before Judge Manton under the show cause provision of the receivership orders.

On September 29th an order was filed, which Judge Manton had made on September 28th, continuing the receiverships *pendente lite*, and providing that the 1932 equity term of this Court be extended until the termination of the proceedings under the receiverships; or, in any event, for a period of three years from September 28, 1932, with leave to apply for further extension there-

of, and with reservation of full jurisdiction in the premises.

Turning now to the Johnson case, Equity No. 71-153, the relevant chronology therein is as follows:

On September 21, 1932, Benjamin F. Johnson, a citizen and resident of the State of Kentucky, filed a bill of complaint herein as a stockholder owning 100 shares of the Manhattan Railway Company of the par value of $10,000. It prayed substantially the same relief asked for in the orders to show cause now before me, and, in addition, that there should be an accounting by the Interborough to the Manhattan Railway Company for all sums due and owing to it.

On the same day an order was made by Judge Caffey allowing Lillian Boehm to intervene as a party plaintiff therein.

The said intervenor alleges that she is the owner of 1400 shares of the capital stock of the Manhattan Railway Company, having a par value of $140,000, and $117,000 par value of First Mortgage 4% bonds of the defendant Manhattan Railway Company,—which securities she has owned for more than a year last past—and also is the owner of $60,000 of First and Refunding 5% Bonds of the Interborough Rapid Transit and $35,000 of its Seven Per Cent Notes.

The first of the orders to show cause before me was granted by Judge Caffey on September 21st, the second was granted by Judge Bondy on October 1st, and the last by me on October 3rd.

All these orders were returnable on the general motion calendar on October 4, 1932, and on that day, the prayer which was contained in all three of these orders to show cause to the effect that the District Court should sit *en banc* to hear these motions was argued and denied by me.

IV. In my enumeration of the various steps taken in this proceeding, I did not mention the fact that on March 20, 1930, Judge Manton as Senior Circuit Judge made and filed an order in this Court which reads as follows:

> "UNITED STATES DISTRICT COURT
> SOUTHERN DISTRICT OF NEW YORK
>
> In order to meet the requirements of the public interest and under the authority conferred by Section 22 of Title 28 of the Code of Laws of the United States, I hereby designate and appoint United States Circuit Judge Martin T. Manton of the Second Circuit to hold at any time a session or sessions of the District Court for the Southern District of New York, for the trial of causes and the hearing and disposition of motions, petitions for naturalization, and such ex parte and other business as may come before me.
>
> Dated, March 20, 1930.
>
> MARTIN T. MANTON
> Senior Circuit Judge of
> the Second Circuit."

The reason why this order was not mentioned in the statement of facts is that it seems to be the settled law that such designation did not make Judge Manton a District Judge. It only gave him authority as Circuit Judge to hold a District Court of the United States. *Craig* v. *Hecht*, 263 U. S. 255, 274. Consequently, it cannot be successfully argued that under that order he was given such a status in the District Court as to give him a right to participate in the division of business of the District Court, or in its rule making.

I think that such a general blanket order of designation is merely an order to provide against possible unexpected emergencies, and it is not in any way involved either directly or indirectly in the present situation. I come to that conclusion not only because, commencing

with Judge Lacombe, such blanket orders have been entered by every Senior Circuit Judge, but also because of the fact that Judge Manton did not purport to act under that order, but, as Senior Circuit Judge, he made two special orders on August 25th, designating himself to hold a District Court in the Southern District of New York beginning August 25th to hear applications in the American Brake Shoe & Foundry case, and declaring, after such a designation, that there was a disagreement between him and the District Judges as to the division of business and that under Section 23 of the Judicial Code he as Senior Circuit Judge solved this disagreement by assigning himself to sit with them as a motion judge.

This I hold was a construction by Judge Manton himself, that the order of March 20, 1930, was merely a blanket order, and that General Rules 1-a and 11-a of the District Court, duly passed on June 30, 1932 and effective July 1, 1932, prevented him from operating under the blanket order after that date.

V. It has been contended that the Johnson bill was not a valid stockholder's bill for a receivership in equity on the ground that it failed to allege in compliance with Equity Rule 27 of the Supreme Court that the plaintiff was a stockholder at the time of the transactions of which he complains. This objection is met by the allegations of Paragraph Four of the complaint.

Further objection is made that the bill fails to set forth the complainant's effort to secure relief through the corporate directors. This is adequately met by the allegations of Paragraphs 24-a and 24-b of the complaint which shows that by reason of the interlocking directorate of the Manhattan Railway Company and the Interborough Rapid Transit Company, a request for action by the directors would have been futile.

It must be observed also that according to the allegations of the bill the Manhattan Railway Company is with-

out any operating personnel and is entirely in the hands of the management of the Interborough.

The bill asks, accordingly, as further relief, for an accounting to the Manhattan Railway Company by the Interborough Rapid Transit Company.

By the intervention as plaintiff of Lillian Boehm, a secured creditor owning secured notes of the Interborough, and First Mortgage bonds constituting a first lien upon the property of the Interborough, there is a sufficient basis in the prayer of the Johnson bill for the appointment of receivers, not only of the Manhattan Railway Company but also of the Interborough Rapid Transit Company.

In my opinion the bill of complaint is not demurrable, but, on the contrary, sets forth good grounds in equity for the relief it asks. That is sufficient for the purpose of the plaintiffs' present motions.

VI. I now have to deal with the *locus standi* of the plaintiffs to ask for the relief sought in their orders to show cause in a proceeding different from that in which the receivers were appointed.

It is earnestly contended by the plaintiff and intervenor in the Johnson case that it cannot properly be claimed that the attack they are making on the orders made by Judge Manton in the *American Brake Shoe & Foundry Company* case is a collateral attack. Indeed, it seems to me that there is a great deal to be said for their contention; for the challenge to the receivers sounds in *quo warranto*.

But each cause is, of course, separate from any other cause and is conducted through its own appropriate procedural course to its appropriate judgment or decree, and there is in my mind a residuum of doubt whether, so long as they remain separate causes, an order could properly be made in the *Johnson* case, Equity No. 71-153, which would affect the receivership orders and the other orders

made in the *American Brake Shoe & Foundry Company* case, Equity No. 70-364.

It seems to be very easy, however, to avoid any such possible procedural difficulty; for it often happens that two cases are so related as to make it appropriate that, as a matter of wise administration, they be consolidated.

If ever there was an instance where an order of consolidation would be appropriate, it seems to me that I have it before me here, for in the *Johnson* case, Equity No. 71-153, the defendants named are the parties in the *American Brake Shoe & Foundry Company* case, Equity No. 70-364, and the receivers who were appointed therein. All these parties have been heard by me on this proceeding and it is clear that there should be a consolidation of the two causes, Equity No. 70-364 and Equity No. 71-153. Both causes are in this Court and I have both the power and the right to make such an order.

Furthermore, such a consolidation by an order of the Court on its own initiative is not an intervention by the complainants herein, Mr. Johnson and Mrs. Boehm, which would require them to subordinate themselves to the procedural situation existing in the *American Brake Shoe & Foundry* case, but they will still remain at large to challenge the jurisdiction of Judge Manton to make orders in that case.

Accordingly, the solicitors for the complainants in the *Johnson* case may present to me an order providing for the consolidation of the *American Brake Shoe and Foundry* case, Equity No. 70-364, with the *Johnson* case, Equity No. 71-153.

VII. I turn now to the merits of the questions involved.

1. The only question which can properly be dealt with by me is whether Judge Manton had any jurisdiction whatever to appoint the receivers under the orders above mentioned.

*Opinion.*

There is not any question but that this Court had jurisdiction in Equity No. 70-364 of the subject matter of the litigation, for the necessary diversity of citizenship exists and the amount involved is far more than that required by the statute.

Furthermore, there is not any question but that this Court had personal jurisdiction of the parties in Equity No. 70-364. The Interborough Rapid Transit Company appeared generally and joined in the complainant's prayer for the appointment of a receiver and the Manhattan Railway Company intervened in the proceeding and prayed for the extension of the receivership to it.

Thus far the usual questions of jurisdiction were solved by the parties unaided, and the cause became effective as a basis for judicial action by this Court when the papers were filed in the office of the Clerk thereof.

When we come, however, to the making of the receivership orders there is another and a very unusual question of jurisdiction involved; that is, whether the exercise of the jurisdiction came within the judicial competence of the judge who purported to exercise it.

For, obviously, the judicial function in any case can only be effectively exercised by a Judge whose status in the court in which he acts is either that of a Judge *de jure*, or, at least, of a Judge *de facto*. It will not suffice if the Judge who purports to act as such is a mere usurper of judicial power.

Into which category did Judge Manton's status fall?

2. The rule making power of the District Courts is vested in them by Section 731 of Title 28 of the United States Code (R. S., Sec. 918) which reads as follows:

> "Sec. 731. *Rules of practice in District Courts* —The district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under Section 730 of this title,

make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

It was under the power thus vested in it that the District Court for the Southern District of New York made and promulgated General Rules 1-a and 11-a. I hold that these rules were not in any way inconsistent with any law of the United States or with any rule of the Supreme Court and that, consequently, they were valid rules and as such had the juridical status of statutes. Cf. *Weil* v. *Neary*, 278 U. S. 160, 169, 170; *Galveston Drydock & Construction Company* v. *Standard Dredging Company*, 40 F. (2d) 442, 444.

It is urged on me that Rule 1-a is a limitation on the power given to the Senior Circuit Judge under Section 18 of the Judicial Code, Title 28, United States Code, Section 22, to make designations of Circuit Judges to hold a District Court, and, hence, is inconsistent with a law of the United States.

I do not agree.

Section 18 empowers a Senior Circuit Judge to designate a Circuit Judge to hold a District Court, but it does not empower him to designate the case which the Circuit Judge is to hear or the part in which he is to sit.

It is urged on me that General Rule 11-a is an equity rule. It is said that Rule 4 of the Equity Rules of this Court, which provides that the Judge who appoints a receiver in a cause shall thereafter hear all matters in that case, is in *pari materia* with General Rule 11-a, that, consequently, General Rule 11-a must be an equity rule, and that as General Rule 11-a has not had the concurrence of a majority of the Circuit Judges of this Circuit, as

required for Equity Rules of the District Court by the Supreme Court Equity Rule 79, it is invalid.

I do not agree that General Rule 11-a is an equity rule, and, consequently, I hold that the fact that it has not had the concurrence of a majority of the Circuit Judges does not affect its validity.

Rule 11-a merely tells where attorneys have to go to get a receiver appointed, and it does not deal with any practice of any kind in equity. It simply points to the door of the room where applications for receiverships must be made. Practice in equity in receivership cases only commences after the making of the order of appointment, which, in consent cases, is analogous to the issuance of process, for then only does an equity receivership based on consent begin.

3. It should also be observed here that the validity of rules of a District Court cannot be determined by the administrative orders of a Senior Circuit Judge. Their validity can only be tested judicially in a proper case, and unless so tested and invalidated they are binding on all who do business in the Court which made them.

4. Judge Manton's Designation Order of August 25, 1932, which was aimed at Rule 1-a, was, I hold, entirely ineffectual to suspend or otherwise affect that rule. First, it was an improper procedure for the purpose as has just been stated, and, second, in the order itself Judge Manton exceeded his statutory authority when he named himself to deal with the American Brake Shoe and Foundry case in the District Court. For Section 18 of the Judicial Code, under which he purported to act, does not provide for any such selective designation or any such focussing of judicial activity in the District Court.

5. Judge Manton's second order of August 25, 1932, which I have called the Division of Business order, involved an attempt to get around General Rule 11-a which

requires all applications for receiverships in equity cases to be made only to the Judge assigned to hold the Bankruptcy and motion part of the business of the Court and to no other Judge.

After Judge Manton had designated himself to hold a District Court for a particular purpose by his first order, he reported to himself, according to his second order, that he found himself in disagreement with the District Judges in this District and, invoking Section 23 of the Judicial Code,—Title 28 United States Code, Section 27,—he made an order for the Division of Business whereby he designated himself to sit with the regular motion Judge and provided that all applications for the appointment of receivers in equity might, for the period of thirty days, be made to him as well as to the regular motion Judge.

On August 26, 1932, these administrative orders of August 25th were filed in the District Court bound together under one cover, and on the same day the order appointing receivers for the Interborough was made.

Section 23 of the Judicial Code, Title 28 United States Code, Section 27, which was invoked to support the Division of Business order, reads as follows:

> "*Districts with more than one judge; division of business.*
>
> "In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but *in case they do not agree*, the senior circuit judge of the circuit in which the district lies, shall make all *necessary* orders for the division of business and the assignment of cases for trial in said district."

The only reported case which I have been able to find, dealing in detail with the operation of the provisions of this Section of the Judicial Code is *Case* v. *United States*.

14 F. (2d) 510, which was decided by the Circuit Court of Appeals for the Eighth Circuit. There a disagreement as to the division of business had arisen between the two district judges for the Eastern District of Oklahoma.

The procedure there followed, as is shown in the report of the case, 14 F. (2d) at 511, was that the disagreeing district judges submitted their disagreement to the Senior Circuit Judge, Judge Sanborn, then of the Eighth Circuit, who thereupon, reciting the disagreement and the submission thereof, made an order which in substance divided the Eastern District of Oklahoma into two territorial divisions, and made a division of business between the two divisions of the District thus constituted.

It was held in *Case* v. *United States*, 14 F. (2d) 510, that a conviction in a criminal case in the division where the case did not rightfully belong under that order was a nullity and the conviction was set aside.

It seems to me to be perfectly clear, that normally, as a disagreement *inter sese* as to the division of business between the district judges of a district can only arise in the District Court and between them, the request for aid in settling their disagreement should be initiated by them and should come from them to the Senior Circuit Judge as the third party named by Section 23 with statutory power to act in settlement of their dispute.

If that is the normal method by which Section 23 of the Judicial Code should be invoked, there certainly would have to be a very marked case of disagreement, which amounted at least to a public scandal, to warrant a departure from that method and to justify the unasked intervention of the Senior Circuit Judge.

Now what have we here?

As I have set forth above, on June 29, 1932, there was filed with the Clerk an agreement for the division of business for the past summer, signed by the eight Judges of this Court.

By that agreed division, Judge Patterson was to sit in Bankruptcy and General Motions from August 15, 1932 through and including August 29, 1932.

There was also filed with the Clerk, on the same day, an agreement, signed by all the judges of this Court, for the division of business for the Court year just beginning —October 1932 to June 1933.

Accordingly, what I have called the domestic economy of this Court was wholly tranquil. There was no disagreement of any kind among the Judges as to the division of business. Therefore, the condition precedent—of disagreement among the District Judges—on which alone the Senior Circuit Judge had a right to step in and make an order of division of the business of the District Court did not exist, and Judge Manton's order of designation of business of August 25, 1932, was entirely void so far as its having any effect on the rules of this Court or the division of business in this Court.

The whole matter may be summed up by saying that when a Circuit Judge is designated to hold a District Court and proceeds to sit therein, he is acting as a District Judge and must obey its rules. He does not carry with him down to the District Court any appellate attributes which put him above the other District Judges of the District Court where he may be functioning. His status *pro hac vice* is the same as theirs and his decisions —like theirs—are subject to the Appellate Jurisdiction of the Circuit Court of Appeals.

6. Judge Knox informs me that no request was made to him by Judge Manton under Rule 1-a for an assignment to deal with the applications of the American Brake Shoe and Foundry Company for the receivership of the Interborough.

Judge Patterson informs me that there was not any application for a receivership order made before him in the American Brake Shoe and Foundry Company case,

Equity No. 70-364, on August 25th or August 26th, although he was at that time sitting in Court or in Chambers and functioning as a Judge of the motion part ready to deal with all such applications.

7. I hold, therefore, that Judge Manton never secured any assignment to sit in the motion part of the District Court.

His orders of August 25th were ineffectual for that purpose, and Judge Knox, as Senior District Judge, did not assign him to the motion part under Rule 1-a.

I hold also that Judge Patterson was the only Judge of this Court who had the power or right to entertain the application for the receivership here in question at the time when it was made.

8. The juridical status of orders made by Judge Manton in this Court in Equity No. 70-364 under the circumstances above described must now be considered.

It must be noted again that, at the time when Judge Manton, on August 26th, made the order appointing receivers for the Interborough Rapid Transit Company, Judge Patterson was sitting and functioning as motion Judge *de jure* in the Bankruptcy and Motion part of this Court.

It is urged upon me nevertheless that Judge Manton had the status of a *de jure* Judge, but that, if he did not, he should be held to have had the status of a motion Judge *de facto*, with the consequence that his orders should be allowed to stand as valid as a matter of public policy. *Norton* v. *Shelby County*, 118 U. S. 425, 441, 442; *Ball* v. *United States*, 140 U. S. 118, 128; *McDowell* v. *United States*, 159 U. S. 596, 601; *Ex parte Henry Ward*, 173 U. S. 452, 456, are cited.

It is true that those cases deal with the status of a Judge *de facto*, but they have not any application here for there cannot be a *de facto* Judge acting or purporting

to act in the Court or in the part of the Court in which a *de jure* Judge is present and functioning. Cf. *United States* v. *Alexander*, 46 Fed. 728, 729; *Hamlin* v. *Kassafer*, 15 Oregon 456, 459; *Boardman* v. *Halliday*, 10 Paige (N. Y.) 223, 232; *Cohn* v. *Beal*, 61 Miss. 398, 399; *Mechem on Public Officers*, Sections 322 and 323, page 216; and see on the general subject *Conover* v. *Devlin*, 15 How. Pr. (N. Y.) 470, 476-479; *Morgan* v. *Quackenbush*, 22 Barb. (N. Y.) 72, 80; 29 Cyk, page 1391, footnote 60.

This seems to me to be a proposition almost as obvious as the fact that two bodies cannot occupy the same space at the same time.

I am aware that the cases to which I have just referred involved statutory offices in the ordinary sense of that term. The office in question here, that of motion Judge, is not such an office but the analogy is perfect, because, by the rules of this Court, there is only one motion Judge in each motion term.

There are three possible categories into which—from the point of view of their relation to a court—Judges may be divided,—(1) Judges *de jure*, (2) Judges *de facto*, and (3) usurping or intruding Judges. Cf. Mechem on Public Officers, Section 321-323, pp. 215-216.

A Judge should, of course, not vacate the order of another Judge of the same rank whether that other Judge, in making the order, was a Judge *de jure* or was acting as a Judge *de facto*. Otherwise litigants would be made the victims of judicial controversialists, and the administration of justice would inevitably tend to become chaotic.

But with a usurping or intruding Judge the rule is different for the orders of such a Judge are wholly void, cf. *United States* v. *Alexander*, 46 Fed. 728, 731, and on the general principle involved, also *Manning* v. *Ketcham*, 58 F. (2d) 948, 949, and tend to mislead the public as to the status of litigations in the Court.

58 *Opinion.*

Consequently, in order to prevent chaotic conditions and the perpetuation by the intruder of his irregular procedure, a Judge *de jure* may always vacate and declare void the orders of a usurping or intruding Judge. Cf. suggested analogy in *Morton* v. *Shelby County*, 118 U. S. 425, 442. His so doing is ultimately for the benefit of the litigants involved in the cause wherein the orders are vacated, and may, if his act is timely, prevent irreparable injury to one or all of them. This is especially true of the situation here involved, for a consent receivership in equity, not being the result of a controversy but of an
59 agreed situation, should have a jurisdictional foundation beyond suspicion before a Court takes over the operation of the estate.

As a result of the most careful reflection of which I am capable on the very unusual situation before me, I hold, for the reasons above given, that Judge Manton's orders in this Court appointing receivers of the Interborough Rapid Transit Company and the Manhattan Railway Company, in Equity No. 70-364, and all other proceedings had by Judge Manton in this Court therein were not proceedings before a Judge *de jure* or before a Judge *de facto*, but were acts which involved usurpation of power which he had not and, consequently, were
60 all *coram non judice* and wholly void and of no effect.

VIII. However, I do not at the present time grant the request to appoint new receivers, for it seems to me that there could not possibly be any more unfortunate situation than to have two sets of receivers contending between themselves for possession of the great property here involved.

But if no appeal from the orders entered herein is taken within twenty days, or, if my decision herein is affirmed on such appeal as may be taken within that time after the return of the mandate from the Appellate

Court to this Court and its filing here, application may be made in pursuance of Rule 11-a to the Judge sitting in the motion part for the appointment of new receivers.

Thus there will not be any interruption of or confusion in the operation of the railroads, pending the settlement of the questions herein involved.

IX. Orders embodying the provisions indicated in my formal decision at the beginning of this opinion may be presented to me for settlement after three days notice, on Tuesday, October 18, 1932, at 2.30 p. m. in my Chambers, Room 1542 Woolworth Building, 233 Broadway, New York City.

October 13, 1932.

WOOLSEY
United States District Judge

164

## Order of Consolidation.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
*Complainant,*
*against*

MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM
165 ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
*Defendants.*

IN EQUITY
E. 71-153

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
166 *Plaintiff,*
*against*

INTERBOROUGH RAPID TRANSIT COMPANY,
*Defendant.*

IN EQUITY
E. 70-364

The cause of BENJAMIN F. JOHNSON against MANHATTAN RAILWAY COMPANY et al. (E. 71-153-1932), came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, and after due deliberation, the Court being fully advised in the premises, and on its own initiation, against the objec-

tion and protest of the defendants above named, and the American Brake Shoe and Foundry Company complainant in the second above entitled cause No. Equity 70-364, and the intervenors in said last mentioned cause —with the exception of Harold Poliner et al., Protective Committee of Manhattan Railway Guaranteed Stock— City of New York defendant in equity No. 71-153, neither consenting nor appearing,

It is ORDERED, ADJUDGED AND DECREED, that the above cause entitled,

> BENJAMIN F. JOHNSON, Complainant, against MANHATTAN RAILWAY COMPANY, subject to leave of Court WILLIAM ROBERTS, as Temporary Receiver of MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, subject to leave of Court VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of INTERBOROUGH RAPID TRANSIT COMPANY, THE CITY OF NEW YORK, and THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Defendants, E. 71-153,

and the above cause entitled,

> THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant, E. 70-364,

be, and they hereby are, consolidated into one cause in this Court, and that the consolidated cause proceed under the title of

2170 *Order of Consolidation.*

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153 |

2171

Dated, New York, October 18, 1932.

WOOLSEY
United States District Judge.

(Presented by Charles Franklin)

2172

## Order Vacating Orders of Judge Manton.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY #71-153 |

The case of Benjamin F. Johnson against Manhattan Railway Company, et al. (E 71-153) came on to be heard at this Term on three orders to show cause, and was argued by counsel, and thereupon, upon consideration thereof, and after due deliberation, it is

ORDERED, ADJUDGED AND DECREED that the motions made by the complainant, Benjamin F. Johnson, and the intervenor, Lillian Boehm, in the equity cause of Benjamin F. Johnson against Manhattan Railway Company, et al. (E 71-153), be, and the same hereby are, granted to the extent hereinafter indicated, as follows:

ORDERED, ADJUDGED AND DECREED, that the following orders made by Judge Martin T. Manton in the cause entitled American Brake Shoe and Foundry Company, *v.* Interborough Rapid Transit Company (E 70-364), be, and they hereby are, and each of them is, vacated and set aside as wholly void and of no juridical effect:

(a) Order dated August 26th, 1932, appointing Victor J. Dowling and Thomas E. Murray, Jr., as Temporary Receivers of Interborough Rapid Transit Company.

(b) Order filed August 26th, 1932, retaining Chadbourne, Stanchfield & Levy, Esqs., as solicitors and general counsel for Victor J. Dowling and Thomas E. Murray, Jr., as Temporary Receivers of the Interborough Rapid Transit Company.

(c) Order filed August 29th, 1932, appointing a Protective Committee for Tort Creditors.

(d) Order dated and filed September 1st, 1932, granting leave to intervene to Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bond Holders.

(e) Order dated and filed September 1st, 1932, granting leave to intervene to Committee for Interborough Rapid Transit Company Ten Year Secured Convertible 7% Gold Note Holders.

(f) Order filed September 2nd, 1932, granting leave to intervene to Committee for Interborough Rapid Transit Company Ten Year 6% Gold Note Holders.

(g) Order dated and filed September 6th, 1932, appointing William Roberts as Temporary Receiver of Manhattan Railway Company.

(h) Order dated and filed September 6th, 1932, granting leave to intervene to Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bond Holders.

(i) Order filed September 7th, 1932, retaining Hughes, Sherman & Dwight, Esqs., as attorneys for the Manhattan Receiver, William Roberts.

(j) Order filed September 9th, 1932, amending Order of August 29th, 1932, appointing Creditors' Committee.

(k) Order (#6) filed September 12th, 1932, that all papers and documents filed be numbered.

(l) Order (#7) filed September 12th, 1932, granting leave to Receivers to maintain printed record of all documents.

(m) Order (#8) filed September 12th, 1932, authorizing Receivers to pay necessary expenses.

(n) Order (#9) filed September 14th, 1932, for Receivers not to pay Franchise Tax.

(o) Order dated September 19th, 1932, permitting Central Hanover Bank and Trust Company as Trustee under Consolidated Mortgage of Manhattan Railway Company to intervene.

(p) Order (#17) filed September 27th, 1932, employing Southern District Court reporters.

(q) Order filed September 28th, 1932, granting leave to Central Hanover Bank and Trust Company to join receivers of Manhattan Railway Company and Interborough Rapid Transit Company as parties defendant to complaint to be filed.

(r) Order filed September 29th, 1932, granting leave to the Protective Committee for Manhattan Railway Company 7% Guaranteed Stockholders to intervene.

(s) Order dated September 28th, 1932, and filed September 29th, 1932, continuing the Receiverships of Interborough Rapid Transit Company and Manhattan Railway Company.

(t) Order filed October 4th, 1932, restraining receivers of Interborough Rapid Transit Company from paying taxes, as indicated.

(u) Order filed October 4th, 1932, directing the receivers to take no action to secure the return to them of any sinking fund moneys now held by Guarantee Trust Company.

(v) Order filed October 11th, 1932, accepting resignation of Chadbourne, Stanchfield & Levy, Esqs., as attorneys for the receivers of Interborough Rapid Transit Company.

(w) Order filed October 11th, 1932, appointing Hornblower, Miller, Miller & Boston, Esqs., as at-

torneys for the receivers of Interborough Rapid Transit Company.

(x) Any order which may be filed in conformance to opinion #1, 7401 by Judge Martin T. Manton, filed October 11th, 1932.

(y) Any and all other or further orders made by Judge Martin T. Manton on or after August 26th, 1932, in this Court, in the cause of American Brake Shoe and Foundry Company against Interborough Rapid Transit Company, Manhattan Railway Company, intervenor (Equity No. 70-364), dealing with the Interborough Rapid Transit Company, and/or the Manhattan Railway Company,

and it is further

ORDERED, ADJUDGED AND DECREED that the operation of this order be and the same hereby is suspended for a period of twenty days after the entry of this order to enable the defendants herein to appeal from this order, if they be so advised, and it is further

ORDERED, ADJUDGED AND DECREED that the said motions, in so far as they seek the appointment of new receivers, be and the same hereby are denied without prejudice, at the present time but if no appeal is taken within twenty days or if, after the decision on such appeal as may be taken within that time, this order is affirmed, then after the entry of the Mandate of the Appellate Court in this court, a new application for such appointment may be made, in pursuance of General Rule 11-a of this Court to the Judge who at that time may be assigned to hold the Bankruptcy and Motion part of the business of this Court, and it is further

ORDERED, ADJUDGED AND DECREED that, in so far as said motions seek to have vacated the orders made and signed

on August 25, 1932 by Honorable Martin T. Manton in his capacity as Senior Circuit Judge, they are denied for want of jurisdiction.

WOOLSEY
United States District Judge.

Dated New Yok City
October 18, 1932
signed at
3:37 P. M.
WOOLSEY
U. S. D. J.

(Presented by Charles Franklin)

2188 **SUMMONS (ORDER OF SEPTEMBER 20, 1932).**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

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| BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.,* 2189 *Defendants.* | IN EQUITY E. 71-153 |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | IN EQUITY E. 70-364 |
| IN THE MATTER *of the* 2190 INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153 |

TO HAROLD PALMER, NORMAN JOHNSON, STANLEY H. LATSHAW, HAROLD SHAW and JOHN W. APPELL, JUNIOR, acting as a Protective Committee for the 7% Guaranteed Stock of MANHATTAN RAILWAY COMPANY, intervenor in the above entitled cause of THE AMERICAN BRAKE SHOE and FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant, In Equity E 70-364, and to MARSHALL & WEHLE, their solicitors, and to THE CITY OF NEW

*Summons (Order of September 20, 1932).*

York and the Corporation Counsel of The City of New York and to Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of the Manhattan Railway Company, as an intervenor in the above entitled cause In Equity E 70-364 by reason of an order made and entered therein on September 28, 1932, and to Davies, Auerbach & Cornell, their solicitors:

Please take notice, that the undersigned will present their petition for appeal from an order made and entered on the 20th day of September, 1932, in the above entitled cause of Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E 71-153 granting leave to said Benjamin F. Johnson to file his bill of complaint, to the Honorable Robert P. Patterson, at his Chambers, 12th Floor Woolworth Building, 233 Broadway, New York, N. Y., on the 20th day of October, 1932, at which time and place you are requested to join in said petition for the allowance of said appeal.

Dated, October 20th, 1932.

The American Brake Shoe and Foundry Company,
by Breed, Abbott and Morgan.

Interborough Rapid Transit Company,
by James L. Quackenbush.

Manhattan Railway Company,
by Dills, Muecke and Schelker.

Victor J. Dowling and Thomas E. Murray, Jr., as Receivers,
by Hornblower, Miller, Miller & Boston.

*Summons (Order of September 20, 1932).*

WILLIAM ROBERTS, as Receiver,
by HUGHES, SCHURMAN AND DWIGHT.

J. P. MORGAN and others as the Committee constituted by and acting under the Deposit Agreement, dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes; and

J. P. MORGAN and others, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Bonds,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

CHARLES HAYDEN and others as a Committee for the protection of Ten-Year Six Per Cent. Gold Notes due October 1, 1932 of the Interborough Rapid Transit Company,
by ROOT, CLARK & BUCKNER.

VAN SANTVOORD MERLE-SMITH and others, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds due April 1, 1990,
by COTTON, FRANKLIN, WRIGHT & GORDON.

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company, dated March 20, 1913,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

*Solicitors.*

*Summons (Order of September 20, 1932).*

Service accepted this 20th day of October, 1932 and joinder in said appeal is hereby refused.

MARSHALL & WEHLE
Solicitors for Protective Committee for the 7% Guaranteed Stock of the Manhattan Railway Company, on grounds stated in annexed memorandum.

ARTHUR J. W. HILLY
Corporation Counsel of the City of New York.

DAVIES, AUERBACH AND CORNELL
Solicitors for Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of the Manhattan Railway Company.

*Summons (Order of September 20, 1932).*

The intervenors, HAROLD PALMER and others, as the Protective Committee for Manhattan Railway Company 7% Guaranteed Stock, by Marshall & Wehle, their Solicitors, in connection with the foregoing statement of "refusal" to join in the petition of Interborough Rapid Transit Company and others, for allowance of appeals, state that such "refusal" is upon the following grounds, among others: *first*, that their substantive rights as set forth by them in cause E-70-364 have not been adversely affected by the orders which are the subject of said petitions for appeal; *second*, that in cause E-71-153 they filed on September 29, 1932, their petition praying for an order allowing intervention in the event that the District Court in that cause should come to exercise jurisdiction of the receivership of Interborough Rapid Transit Company; and *third*, that their rights, if they are to be asserted through intervention, must be in subordination to whatever cause, in which the District Court finally exercises jurisdiction over receivers of said Company.

October 20, 1932.

MARSHALL & WEHLE,
Solicitors for
Harold Palmer and others.

## ORDER OF SEVERANCE (ORDER OF SEPTEMBER 20, 1932).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

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| BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.* | IN EQUITY E. 71-153 |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | IN EQUITY E. 70-364 |
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153 |

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

INTERBOROUGH RAPID TRANSIT COMPANY,

VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., Receivers of the Interborough Rapid Transit Company,

MANHATTAN RAILWAY COMPANY,

WILLIAM ROBERTS, Receiver of the Manhattan Railway Company,

206 *Order of Severance (Order of September 20, 1932).*

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER,
207 HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

CHARLES HAYDEN, EARLE BAILIE, GRAYSON M.-P. MURPHY, ALBERT H. WIGGIN AND WILLIS D. WOOD, as Committee for the Protection of the Holders of Ten-Year 6% Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company,

VAN SANTVOORD MERLE-SMITH, WALTER BENNETT, PHILIP A. BENSON, FRED J. FULLER and JAMES LEE LOOMIS,
208 as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds,

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913,

appellants, having presented their petition for appeal from an order entitled in the above entitled cause of "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E 71-153", granting leave to said Benjamin F.

*Order of Severance (Order of September 20, 1932).*

Johnson to file his bill of Complaint, made and entered September 20, 1932, and it appearing that Harold Palmer, Norman Johnson, Stanley H. Latshaw, Harold Shaw and John W. Appell, Junior, acting as a Protective Committee for the 7% Guaranteed Stock of Manhattan Railway Company, intervenor in the above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364," and The City of New York, one of the defendants in the above entitled cause of "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E 71-153" and Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company, an intervenor in the above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364", have been duly notified and requested by the solicitors for said appellants to join in said petition for appeal and have failed or refused to join therein, the said appellants are hereby granted the right to appeal alone without joining said Harold Palmer, Norman Johnson, Stanley H. Latshaw, Harold Shaw and John W. Appell, Junior, acting as a Protective Committee for the 7% Guaranteed Stock of Manhattan Railway Company, said The City of New York and said Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company, as appellants.

Dated, New York, October 20th, 1932.

ROBERT P. PATTERSON,
United States District Judge.

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## PETITION FOR APPEAL FROM ORDER OF SEPTEMBER 20, 1932.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON, *Complainant,* *against* 213 MANHATTAN RAILWAY COMPANY, *et al.,* *Defendants.* | IN EQUITY E. 71-153. |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | IN EQUITY E. 70-364. |
| IN THE MATTER 214 *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153. |

TO THE HONORABLE ROBERT P. PATTERSON, JUDGE OF SAID COURT:

The petition of the undersigned enumerated parties respectfully shows:—

Your petitioners (without recognizing or acknowledging that there is any such cause validly pending in this

Court as "In the Matter of the Interborough-Manhattan Receivership Proceedings, In Equity E 71-153"), pray that they may be permitted to take an appeal to the United States Circuit Court of Appeals for the Second Circuit from the order entered on the 20th day of September, 1932, in the United States District Court for the Southern District of New York, granting leave to said Johnson to file his bill of complaint, in the cause heretofore entitled "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity 71-153", for the reasons specified in the Assignment of Errors which is filed herewith, and your petitioners pray that this appeal may be allowed, that a citation issue, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Your petitioner, The American Brake Shoe and Foundry Company, is complainant in the above entitled cause In Equity, E 70-364 and is a defendant in the cause in Equity E 71-153; your petitioners Interborough Rapid Transit Company and Manhattan Railway Company are defendants in both of the causes first above entitled; your petitioners Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of Interborough Rapid Transit Company, and William Roberts, as Receiver of Manhattan Railway Company, are defendants in the above entitled cause In Equity E 71-153; your petitioners J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, are as such Committee a

party defendant in the above entitled cause In Equity E 70-364; your petitioners J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, are, as such Committee, a party defendant in the above entitled cause In Equity E 70-364; your petitioners Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, constituting a Committee for the protection of the holders of the Ten-Year Six Per Cent. Gold Notes due October 1, 1932, are as such Committee a party defendant in the above entitled cause In Equity E 70-364; your petitioners Van Santvoord Merle-Smith, Walter Bennett, Philip A. Benson, Fred J. Fuller and James Lee Loomis, constituting a Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds due April 1, 1990, are as such Committee a party defendant in the above entitled cause In Equity E 70-364; your petitioner Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company, dated March 20, 1913, is a party to the above entitled cause In Equity E 70-364 by reason of an order made and entered therein on September 28, 1932.

Dated, October 20th, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
by BREED, ABBOTT AND MORGAN.

INTERBOROUGH RAPID TRANSIT COMPANY,
by JAMES L. QUACKENBUSH.

MANHATTAN RAILWAY COMPANY,
by DILLS, MUECKE AND SCHELKER.

*Petition for Appeal From Order of September 20, 1932.*

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers,
by HORNBLOWER, MILLER, MILLER & BOSTON.

WILLIAM ROBERTS, as Receiver,
by HUGHES, SCHURMAN AND DWIGHT.

J. P. MORGAN and others, as Committees as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

CHARLES HAYDEN and others, as Committee as above,
by ROOT, CLARK & BUCKNER.

VAN SANTVOORD, MERLE-SMITH and others, as Committee as above,
by COTTON, FRANKLIN, WRIGHT & GORDON.

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

*Solicitors.*

Appeal allowed this 20th day of October, 1932, upon giving bond as required by law in the sum of Two Hundred and Fifty Dollars.

ROBERT P. PATTERSON,
U. S. District Judge.

## Assignment of Errors on Appeal from Order of Judge Francis G. Caffey, dated September 20, 1932.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

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|---|---|
| BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.* | IN EQUITY E. 71-153 |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | IN EQUITY E. 70-364 |
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153 |

Now come

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

INTERBOROUGH RAPID TRANSIT COMPANY,

VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., Receivers of the Interborough Rapid Transit Company,

MANHATTAN RAILWAY COMPANY,

*Assignment of Errors on Appeal From Order of Judge Francis G. Caffey, dated September 20, 1932.* 222

WILLIAM ROBERTS, Receiver of the Manhattan Railway Company,

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

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J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

CHARLES HAYDEN, EARLE BAILIE, GRAYSON M.-P. MURPHY, ALBERT H. WIGGIN AND WILLIS D. WOOD, as Committee for the Protection of the Holders of Ten-Year 6% Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company,

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VAN SANTVOORD MERLE-SMITH, WALTER BENNETT, PHILIP A. BENSON, FRED J. FULLER and JAMES LEE LOOMIS, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds,

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913,

as appellants (without thereby recognizing or acknowledging that there is any such cause validly pending in

*Assignment of Errors on Appeal From Order of Judge Francis G. Caffey, dated September 20, 1932.*

this Court as "In the Matter of the Interborough-Manhattan Receivership Proceedings, E. 71-153") and file the following Assignment of Errors upon which they will rely in the appeal herewith petitioned for from the order of this Court made in the above entitled cause of "Benjamin F. Johnson, Complainant, against the Manhattan Railway Company, et al., Defendants, In Equity E. 71-153", on the 20th day of September, 1932, to wit:—

1. That the Court erred in making said order of September 20, 1932.

2. That the Court erred in its said order of September 20, 1932 in granting leave to the complainant, Benjamin F. Johnson, in said suit In Equity No. E. 71-153, to file in the United States District Court for the Southern District of New York the bill of complaint mentioned in the petition of said Benjamin F. Johnson referred to in said order, and to make the Interborough Rapid Transit Company, the Manhattan Railway Company and their respective Receivers among the parties defendant to said bill of complaint mentioned in said petition.

3. That the Court erred in holding that it had jurisdiction or power, or authority to enter the said order in said cause.

4. That the Court erred in its said order of September 20, 1932 in thereby dissolving or modifying the injunction contained in the order made by the United States District Court for the Southern District of New York on the 26th day of August, 1932, in the above entitled case, in Equity (E 70-364) signed by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, appointing receivers of the Interborough Rapid Transit Company and enjoining

*Assignment of Errors on Appeal From Order of Judge Francis G. Caffey, dated September 20, 1932.*

all persons whomsoever from interfering with the possession and management of the property over which the Receivers were appointed and giving other relief.

5. That the Court erred in its said order of September 20, 1932 in thereby dissolving or modifying the injunctions contained in the order made by the United States District Court for the Southern District of New York on the 6th day of September, 1932 in the above entitled cause In Equity E 70-364 signed by Hon. Martin T. Manton, United States Circuit Judge duly designated to hold a District Court of the United States for the Southern District of New York, appointing a Receiver for the Manhattan Railway Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the said Receiver was appointed and giving other relief.

6. That the Court erred in making the said order of September 20, 1932 in violation of the terms and provisions of said order made and entered on August 26, 1932, in the above entitled cause of "The American Brake Shoe and Foundry Company, Defendant, In Equity E. 70-364", by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York.

7. That the Court erred in making the said order of September 20, 1932 in violation of the terms and provisions of said order made in the above entitled cause In Equity E 70-364 on the 6th day of September, 1932 by the Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York.

WHEREFORE, said appellants pray that the said order of September 20, 1932 may be reversed and for such

2236 *Assignment of Errors on Appeal From Order of Judge Francis G. Caffey, dated September 20, 1932.*

other and further relief as to the Court may seem just and proper.

New York, N. Y.
October 20th, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
by BREED, ABBOTT AND MORGAN.

INTERBOROUGH RAPID TRANSIT COMPANY,
by JAMES L. QUACKENBUSH.

2237 MANHATTAN RAILWAY COMPANY,
by DILLS, MUECKE AND SCHELKER.

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers,
by HORNBLOWER, MILLER, MILLER & BOSTON.

WILLIAM ROBERTS, as Receiver,
by HUGHES, SCHURMAN AND DWIGHT.

J. P. MORGAN and others, as Committees as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

CHARLES HAYDEN and others, as Committee
2238 as above,
by ROOT, CLARK & BUCKNER.

VAN SANTVOORD MERLE-SMITH and others, as Committee as above,
by COTTON, FRANKLIN, WRIGHT & GORDON.

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.
*Solicitors.*

**BOND ON APPEAL.**

The appellants' bond on appeal in the sum of $250 was duly approved and filed, and the printing of the same in the record was waived.

## MOTION OF COMMITTEE FOR 7% GUARANTEED MANHATTAN RAILWAY COMPANY TO STRIKE THEIR NAMES FROM CITATION AND ORDER DENYING MOTION.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

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|---|---|
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E 71-153. |

Come now HAROLD PALMER, NORMAN JOHNSON, STANLEY R. LATSHAW, HAROLD SWAIN and JOHN W. APPEL, JUNIOR, as the Protective Committee for the 7% Guaranteed Stock of Manhattan Railway Company, intervenors in cause E 70-364, by their Solicitors, Marshall & Wehle, and move the Court to strike the names of each of said intervenors from the three proposed citations on appeal now being submitted to this Court before any of said citations shall receive the approval or signature of any Judge of this Court.

October 20th, 1932.

MARSHALL & WEHLE
Solicitors.

Denied
(sgd) R. P. P.
U. S. D. J.

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## CITATION ON APPEAL (ORDER OF SEPTEMBER 20, 1932).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.* | IN EQUITY E. 71-153 |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | IN EQUITY E. 70-364 |
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153 |

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UNITED STATES OF AMERICA: ss.

To: BENJAMIN F. JOHNSON, and THE CITY OF NEW YORK, and LILLIAN BOEHM, and NATHAN L. AMSTER, MORTON F. STERN, HON. PETER TEN EYCK, C. R. JEFFERS, Secretary, BLIN W. PAGE and CHARLES FRANKLIN, attorney for said Committee, as a Manhattan Railway Company Common Stockholders' Protective Commit-

tee, and HAROLD PALMER, NORMAN JOHNSON, STANLEY H. LATSHAW, HAROLD SHAW and JOHN W. APPELL, JUNIOR, acting as a Protective Committee for the 7% Guaranteed Stock of Manhattan Railway Company, and CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee under the Consolidated Mortgage of Manhattan Railway Company, appellees,

GREETING:

You and each of you are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Second Circuit to be held at the Borough of Manhattan, City of New York, on the 9th day of November, 1932, pursuant to an order allowing an appeal from an order granting the appellee, Benjamin F. Johnson, leave to file his bill of complaint with Manhattan Railway Company, William Roberts, as Temporary Receiver of Manhattan Railway Company, Interborough Rapid Transit Company, Victor J. Dowling and Thomas E. Murray, Jr., as Temporary Receivers of Interborough Rapid Transit Company, The City of New York and The American Brake Shoe and Foundry Company, as defendants, made and entered on the 20th day of September, 1932 in the District Court of the United States for the Southern District of New York, in a suit wherein

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

INTERBOROUGH RAPID TRANSIT COMPANY,

VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., Receivers of the Interborough Rapid Transit Company,

MANHATTAN RAILWAY COMPANY,

WILLIAM ROBERTS, Receiver of the Manhattan Railway Company,

2248 *Citation on Appeal (Order of September 20, 1932).*

J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker,
2249 Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, as Committee for the Protection of the Holders of Ten-Year 6% Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company,

Van Santvoord Merle-Smith, Walter Bennett, Philip A. Benson, Fred J. Fuller and James Lee Loomis,
2250 as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds,

Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913,

are appellants and you are appellees, to show cause, if any there be, why said order rendered against said appellants, should not be corrected, and why speedy justice should not be done to the parties on that behalf.

*Citation on Appeal (Order of September 20, 1932).*

WITNESS, Honorable Robert P. Patterson, District Judge, this 20th day of October in the year of our Lord, One Thousand Nine Hundred and Thirty-two and of the Independence of the United States of America the One hundred Fifty-seventh.

ROBERT P. PATTERSON,
U. S. District Judge.

Service of a copy of the foregoing citation is acknowledged this 20th day of October, 1932.

CHARLES FRANKLIN,
Solicitor for Benjamin F. Johnson; and for Nathan L. Amster and others, as Committee as above.

ARTHUR J. W. HILLY,
Corporation Counsel of The City of New York.

BOEHM & ZEIGER,
Solicitors for Lillian Boehm.

MARSHALL & WEHLE,
Solicitors for Harold Palmer and others, as Committee as above.

DAVIES, AUERBACH & CORNELL,
Solicitors for Central Hanover Bank & Trust Company, as Trustee as above.

## SUMMONS (CONSOLIDATION ORDER).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.* | IN EQUITY E. 71-153 |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | IN EQUITY E. 70-364 |
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153 |

To HAROLD PALMER, NORMAN JOHNSON, STANLEY H. LATSHAW, HAROLD SHAW and JOHN W. APPELL, JUNIOR, acting as a Protective Committee for the 7% Guaranteed Stock of MANHATTAN RAILWAY COMPANY, intervenor in the above entitled cause of THE AMERICAN BRAKE SHOE and FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant, In Equity E 70-364, and to MARSHALL

& WEHLE, their solicitors, and to THE CITY OF NEW YORK and the CORPORATION COUNSEL OF THE CITY OF NEW YORK:—

PLEASE TAKE NOTICE, that the undersigned will present their petition for appeal from an order made and entered on the 18th day of October, 1932, consolidating the first two above entitled causes, to the Honorable Robert P. Patterson, at his Chambers, 12th Floor Woolworth Building, 233 Broadway, New York, N. Y., on the 20th day of October, 1932, at which time and place you are requested to join in said petition for the allowance of said appeal.

Dated, October 20th, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
by BREED, ABBOTT AND MORGAN.

INTERBOROUGH RAPID TRANSIT COMPANY,
by JAMES L. QUACKENBUSH.

MANHATTAN RAILWAY COMPANY,
by DILLS, MUECKE AND SCHELKER.

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers,
by HORNBLOWER, MILLER, MILLER & BOSTON.

WILLIAM ROBERTS, as Receiver,
by HUGHES, SCHURMAN AND DWIGHT.

J. P. MORGAN and others as the Committee constituted by and acting under the Deposit Agreement, dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes; and
J. P. MORGAN and others, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Bonds,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

CHARLES HAYDEN and others as a Committee for the protection of Ten-Year Six Per Cent. Gold Notes due October 1, 1932 of the Interborough Rapid Transit Company,
by ROOT, CLARK & BUCKNER.

VAN SANTVOORD MERLE-SMITH and others, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds due April 1, 1990,
by COTTON, FRANKLIN, WRIGHT & GORDON.

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company, dated March 20, 1913,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee under the Consolidated Mortgage of the Manhattan Railway Company,
by DAVIES, AUERBACH AND CORNELL.

*Solicitors.*

Service accepted this 20th day of October, 1932 and joinder in said appeal is hereby refused.

MARSHALL & WEHLE,
Solicitors for Protective Committee for the 7% Guaranteed Stock of the Manhattan Railway Company, on grounds stated in annexed memorandum.

ARTHUR J. W. HILLY,
Corporation Counsel of The City of New York.

The intervenors, HAROLD PALMER and others, as the Protective Committee for Manhattan Railway Company 7% Guaranteed Stock, by Marshall & Wehle, their Solicitors, in connection with the foregoing statement of "refusal" to join in the petition of Interborough Rapid Transit Company and others, for allowance of appeals, state that such "refusal" is upon the following grounds, among others: *first*, that their substantive rights as set forth by them in cause E-70-364 have not been adversely affected by the orders which are the subject of said petitions for appeal; *second*, that in cause E-71-153 they filed on September 29, 1932, their petition praying for an order allowing intervention in the event that the District Court in that cause should come to exercise jurisdiction of the receivership of Interborough Rapid Transit Company; and *third*, that their rights, if they are to be asserted through intervention, must be in subordination to whatever cause, in which the District Court finally exercises jurisdiction over receivers of said Company.

October 20, 1932.

MARSHALL & WEHLE,
Solicitors for
Harold Palmer and others.

## ORDER OF SEVERANCE (CONSOLIDATION ORDER).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.* | IN EQUITY E. 71-153 |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | IN EQUITY E. 70-364 |
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153 |

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

INTERBOROUGH RAPID TRANSIT COMPANY,

MANHATTAN RAILWAY COMPANY,

VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., Receivers of the Interborough Rapid Transit Company,

WILLIAM ROBERTS, Receiver of the Manhattan Railway Company,

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds. 22

CHARLES HAYDEN, EARLE BAILIE, GRAYSON M.-P. MURPHY, ALBERT H. WIGGIN AND WILLIS D. WOOD, as Committee for the Protection of the Holders of Ten-Year 6% Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company,

VAN SANTVOORD MERLE-SMITH, WALTER BENNETT, PHILIP A. BENSON, FRED J. FULLER and JAMES LEE LOOMIS, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, 227

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee under Consolidated Mortgage of Manhattan Railway Company,

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913,

as appellants, having presented their petition for appeal from an order made and entered on the 18th day of October, 1932, consolidating the first two above entitled causes, and it appearing that Harold Palmer, Norman Johnson, Stanley H. Latshaw, Harold Shaw and John W. Appell, Junior, acting as a Protective Committee for the 7% Guaranteed Stock of Manhattan Railway Company, intervenor in the above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364," and The City of New York, one of the defendants in the above entitled cause of "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E 71-153" have been duly notified and requested by the solicitors for said appellants to join in said petition for appeal and have failed or refused to join therein, the said appellants are hereby granted the right to appeal alone without joining said The City of New York and said Harold Palmer, Norman Johnson, Stanley H. Latshaw, Harold Shaw and John W. Appell, Junior, acting as a Protective Committee for the 7% Guaranteed Stock of Manhattan Railway Company, as appellants.

Dated, New York, October 20, 1932.

ROBERT P. PATTERSON,
United States District Judge.

22

## PETITION FOR APPEAL FROM CONSOLIDATION ORDER.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.,* *Defendants.* | IN EQUITY E. 71-153. 227 |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | IN EQUITY E. 70-364. |
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153. 2277 |

TO THE HONORABLE ROBERT P. PATTERSON, JUDGE OF SAID COURT:

The petition of the undersigned enumerated parties respectfully shows:—

*Petition for Appeal From Consolidation Order.*

Your petitioners (without recognizing or acknowledging that there is any such cause validly pending in this Court as "In the Matter of the Interborough-Manhattan Receivership Proceedings, In Equity E 71-153"), pray that they may be permitted to take an appeal to the United States Circuit Court of Appeals for the Second Circuit from the order entered in the United States District Court for the Southern District of New York, on the 18th day of October, 1932 in the above entitled cause of "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E 71-153", and in the above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364", consolidating the two said causes into one cause under the title of "In the Matter of the Interborough-Manhattan Receivership Proceedings, In Equity E 71-153", and the proceedings had prior thereto, for the reasons specified in the Assignment of Errors which is filed herewith, and your petitioners pray that this appeal may be allowed, that a citation issue, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Your petitioner, The American Brake Shoe and Foundry Company, is complainant in the above entitled cause In Equity E 70-364, and is a defendant in the cause In Equity E 71-153; your petitioners, Interborough Rapid Transit Company and Manhattan Railway Company are defendants in both of the causes first above entitled; your petitioners, Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of Interborough Rapid Transit Company, and William Roberts, as Receiver of Manhattan Railway Company, are defendants in the

above entitled cause In Equity E 71-153; your petitioners, J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, are as such Committee a party defendant in the above entitled cause In Equity E 70-364; your petitioners, J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bends, are, as such Committee, a party defendant in the above entitled cause In Equity E 70-364; your petitioners, Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, constituting a Committee for the protection of the holders of the Ten-Year Six Per Cent. Gold Notes due October 1, 1932, are, as such Committee, a party defendant in the above entitled cause In Equity E 70-364; your petitioners, Van Santvoord Merle-Smith, Walter Bennett, Philip A. Benson, Fred J. Fuller and James Lee Loomis, constituting a Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds due April 1, 1990, are, as such Committee, a party defendant in the above entitled cause In Equity E 70-364; your petitioner, Central Hanover Bank & Trust Company, as Trustee under the Consolidated Mortgage of the Manhattan Railway Company, is a party in the above entitled cause In Equity E 70-364 by reason of an order made and en-

2284 *Petition for Appeal From Consolidation Order.*

tered therein on September 28, 1932; your petitioner, Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company, dated March 20, 1913, is a party to the above entitled cause In Equity E 70-364 by reason of an order made and entered therein on September 28, 1932.

Dated, October 20th, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
2285 by BREED, ABBOTT AND MORGAN.

INTERBOROUGH RAPID TRANSIT COMPANY,
by JAMES L. QUACKENBUSH.

MANHATTAN RAILWAY COMPANY,
by DILLS, MUECKE AND SCHELKER.

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers,
by HORNBLOWER, MILLER, MILLER & BOSTON.

WILLIAM ROBERTS, as Receiver,
by HUGHES, SCHURMAN AND DWIGHT.

J. P. MORGAN and others, as Committees as
2286 above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

CHARLES HAYDEN and others, as Committee as above,
by ROOT, CLARK & BUCKNER.

VAN SANTVOORD MERLE-SMITH and others, as Committee as above,
by COTTON, FRANKLIN, WRIGHT & GORDON.

*Petition for Appeal From Consolidation Order.*

GUARANTY TRUST COMPANY OF NEW YORK,
as Trustee as above,
by DAVIS, POLK, WARDWELL, GARDINER
& REED.

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee as above,
by DAVIES, AUERBACH AND CORNELL.

*Solicitors.*

Appeal allowed this 20th day of October, 1932, upon giving bonds as required by law in the sum of Two Hundred and Fifty Dollars.

ROBERT P. PATTERSON,
U. S. District Judge.

## Assignment of Errors on Appeal from Order of October 18, 1932 (Consolidation Order).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.* | IN EQUITY E. 71-153 |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | IN EQUITY E. 70-364 |
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153 |

Now come

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

INTERBOROUGH RAPID TRANSIT COMPANY,

MANHATTAN RAILWAY COMPANY,

VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., Receivers of the Interborough Rapid Transit Company,

*Assignment of Errors on Appeal From Order of October 18, 1932 (Consolidation Order).*

WILLIAM ROBERTS, Receiver of the Manhattan Railway Company,

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

CHARLES HAYDEN, EARLE BAILIE, GRAYSON M.-P. MURPHY, ALBERT H. WIGGIN AND WILLIS D. WOOD, as Committee for the Protection of the Holders of Ten-Year 6% Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company,

VAN SANTVOORD MERLE-SMITH, WALTER BENNETT, PHILIP A. BENSON, FRED J. FULLER and JAMES LEE LOOMIS, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds,

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913,

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee under Consolidated Mortgage of Manhattan Railway Company,

96 *Assignment of Errors on Appeal From Order of October 18, 1932 (Consolidation Order).*

as appellants (without thereby recognizing or acknowledging that there is any such cause validly pending in this Court as "In the Matter of the Interborough-Manhattan Receivership Proceedings, E. 71-153") and file the following Assignment of Errors upon which they will rely in the appeal herewith petitioned for from the order of this Court made in the above entitled cause of "Benjamin F. Johnson, Complainant, against the Manhattan Railway Company, et al., Defendants, in Equity E. 71-153" on the 18th day of October, 1932, and made in the
297 above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, in Equity E. 70-364," consolidating the two said causes into one cause under the title of "In the Matter of the Interborough-Manhattan Receivership Proceedings, in Equity E. 71-153" (said order hereinafter for convenience being referred to as the "Consolidation Order") and the proceedings had prior thereto, to wit:—

1. That the Court erred in making said order of October 18, 1932 (Consolidation Order).

298 2. That the Court erred in its said order of October 18, 1932 (Consolidation Order) in ordering that the said cause of "Benjamin F. Johnson *v.* Manhattan Railway Company, et al., Defendants, In Equity E. 71-153," and the said cause of "The American Brake Shoe and Foundry Company, Complainant, *v.* Interborough Rapid Transit Company, Defendant, In Equity E. 70-364," should be consolidated into one cause in this Court under the title of "In the Matter of the Interborough-Manhattan Receivership Proceedings, In Equity E. 71-153."

3. That the Court erred in making the said order of October 18, 1932 (Consolidation Order) in thereby

dissolving or modifying the injunctions contained in the orders made and entered in the above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, *v.* Interborough Rapid Transit Company, Defendant, in Equity E. 70-364," by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on August 26, 1932 and on September 28, 1932, appointing Receivers of the Interborough Rapid Transit Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the Receivers were appointed and giving other relief.

4. That the Court erred in making the said order of October 18, 1932 (Consolidation Order) in violation of the orders made and entered in the above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364," by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on August 26, 1932 and on September 28, 1932, appointing Receivers of the Interborough Rapid Transit Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the Receivers were appointed and giving other relief.

5. That the Court erred in its said order of October 18, 1932 (Consolidation Order) in thereby dissolving or modifying the injunctions contained in the orders made by the United States District Court for the Southern District of New York on the 6th day of September, 1932 and on the 28th day of September, 1932 in the above en-

*Assignment of Errors on Appeal From Order of October 18, 1932 (Consolidation Order).*

titled cause In Equity E 70-364 signed by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, appointing a Receiver for the Manhattan Railway Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the said Receiver was appointed and giving other relief.

6. That the Court erred in making and entering said order of October 18, 1932 (Consolidation Order) in violation of the terms and provisions of the said orders made in the above entitled cause In Equity E. 70-364 by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on the 6th day of September, 1932 and on the 28th day of September, 1932.

7. That the Court erred in holding that it had jurisdiction or power, or authority to make the said order of October 18, 1932 (Consolidation Order).

8. That the Court erred in holding that the two causes In Equity No. E. 70-364 and No. E. 71-153 were so related as to make it reasonable or appropriate that they be consolidated.

9. That the Court erred in consolidating the two causes In Equity E 70-364 and E 71-153 as a medium of getting the said two independent suits united so that the parties plaintiff in the said cause In Equity E 71-153 might thereby claim to have acquired a standing as plaintiffs or intervenors or otherwise in said cause In Equity E 70-364 which would entitle them to take proceedings in said cause In Equity 70-364 as if they were parties or intervenors therein.

*Assignment of Errors on Appeal From Order of October 18, 1932 (Consolidation Order).*

10. That the Court erred in holding that by consolidating the said two causes In Equity E 70-364 and E 71-153, it thereby obtained the power to properly make an order in the Johnson Cause In Equity E 71-153 which would affect the receivership orders and the other orders made in The American Brake Shoe and Foundry Company case In Equity E 70-364.

11. That the Court erred in holding that the bills of complaint of said Benjamin F. Johnson in the cause of "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E 71-153," as supplemented, state facts sufficient to constitute a cause of action.

12. That the Court erred in holding that upon the allegations of the bill of complaint and the supplemental bill of complaint of Benjamin F. Johnson and the supplemental bill of complaint of Lillian Boehm in said cause In Equity E. 71-153, complainants were entitled to maintain a suit in equity although essential allegations were shown to be without foundation by answering affidavits.

13. That the Court erred in holding that the cause entitled "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E 71-153," as the same stood in this Court on October 18, 1932, is within the jurisdiction of the United States District Court.

14. That the Court erred in holding that the cause entitled "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity No. E 71-153" is within the jurisdiction of the Court, notwithstanding the intervention of Lillian

*Assignment of Errors on Appeal From Order of October 18, 1932 (Consolidation Order).*

Boehm, a citizen and resident of the State of New York, as a party plaintiff, with the consent of the plaintiff Benjamin F. Johnson.

WHEREFORE, said appellants pray that the said order may be reversed and for such other and further relief as to the Court may seem just and proper.

New York, N. Y.
October 20th, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
by BREED, ABBOTT AND MORGAN.

INTERBOROUGH RAPID TRANSIT COMPANY,
by JAMES L. QUACKENBUSH.

MANHATTAN RAILWAY COMPANY,
by DILLS, MUECKE AND SCHELKER.

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers,
by HORNBLOWER, MILLER, MILLER & BOSTON.

WILLIAM ROBERTS, as Receiver,
by HUGHES, SCHURMAN AND DWIGHT.

J. P. MORGAN and others, as Committees as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

CHARLES HAYDEN and others, as Committee as above,
by ROOT, CLARK & BUCKNER.

VAN SANTVOORD MERLE-SMITH and others, as Committee as above,
by COTTON, FRANKLIN, WRIGHT & GORDON.

*Bond on Appeal.*
*Citation on Appeal (Consolidation Order).*

GUARANTY TRUST COMPANY OF NEW YORK,
as Trustee as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.
CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee as above,
by DAVIES, AUERBACH AND CORNELL.
*Solicitors.*

## BOND ON APPEAL.

The appellants' bond on appeal in the sum of $250 was duly approved and filed, and the printing of the same in the record was waived.

## CITATION ON APPEAL (CONSOLIDATION ORDER).

IN THE

## DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.* | IN EQUITY E. 71-153 |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | IN EQUITY E. 70-364 |
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153 |

UNITED STATES OF AMERICA: ss.

TO: BENJAMIN F. JOHNSON, and THE CITY OF NEW YORK

1a *Citation on Appeal (Consolidation Order).*

and Lillian Boehm, and Nathan L. Amster, Morton F. Stern, Hon. Peter Ten Eyck, C. R. Jeffers, Secretary, Blin W. Page and Charles Franklin, attorney for said Committee, as a Manhattan Railway Company Common Stockholders' Protective Committee, appellees,

GREETING:

You and each of you are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Second Circuit to be held
2a at the Borough of Manhattan, City of New York, on the 9th day of November, 1932, pursuant to an order allowing an appeal from an order consolidating the first two above entitled causes, made and entered on the 18th day of October, 1932 in the District Court of the United States for the Southern District of New York, in a suit wherein

The American Brake Shoe and Foundry Company,

Interborough Rapid Transit Company,

Manhattan Railway Company,

Victor J. Dowling and Thomas E. Murray, Jr., Receivers of the Interborough Rapid Transit Company,

William Roberts, Receiver of the Manhattan Railway
3a Company,

J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

for the Protection of the Holders of Ten-Year 6% Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company,

Van Santvoord Merle-Smith, Walter Bennett, Philip A. Benson, Fred J. Fuller and James Lee Loomis, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds,

Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1932,

Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Company,

are appellants and you are appellees, to show cause, if any there be, why said order rendered against said appellants, should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness, Honorable Robert P. Patterson, District Judge, this 20th day of October in the year of our Lord, One Thousand Nine Hundred and Thirty-two and of the Independence of the United States of America the One hundred Fifty-seventh.

Robert P. Patterson,
U. S. District Judge.

Service of a copy of the foregoing citation is acknowledged this 20th day of October, 1932.

Charles Franklin,
Solicitor for Benjamin F. Johnson; and Nathan L. Amster and others, as Committee as above.

Arthur J. W. Hilly,
Corporation Counsel of The City of New York.

Boehm & Zeiger,
Solicitors for Lillian Boehm.

Marshall & Wehle,

## SUMMONS (VACATING ORDER).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.* | IN EQUITY E. 71-153 |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | IN EQUITY E. 70-364 |
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153 |

TO HAROLD PALMER, NORMAN JOHNSON, STANLEY H. LATSHAW, HAROLD SHAW and JOHN W. APPELL, JUNIOR, acting as a Protective Committee for the 7% Guaranteed Stock of MANHATTAN RAILWAY COMPANY, intervenor in the above entitled cause of THE AMERICAN BRAKE SHOE and FOUNDRY COMPANY, Complainant, against INTERBOROUGH RAPID TRANSIT COMPANY, Defendant, In Equity E 70-364, and MARSHALL

& WEHLE, their solicitors, and THE CITY OF NEW YORK and the CORPORATION COUNSEL OF THE CITY OF NEW YORK, and CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee under the Consolidated Mortgage of the Manhattan Railway Company, as an intervenor in the above entitled cause In Equity E 70-364 by reason of an order made and entered therein on September 28, 1932, and DAVIES, AUERBACH & CORNELL, their solicitors:

PLEASE TAKE NOTICE, that the undersigned will present their petition for appeal from an order made and entered on the 18th day of October, 1932 vacating certain orders made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364," to the Honorable Robert P. Patterson, at his Chambers, 12th Floor Woolworth Building, 233 Broadway, New York, N. Y., on the 20th day of October, 1932, at which time and place you are requested to join in said petition for the allowance of said appeal.

Dated, October 20th, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
by BREED, ABBOTT AND MORGAN.

INTERBOROUGH RAPID TRANSIT COMPANY,
by JAMES L. QUACKENBUSH.

MANHATTAN RAILWAY COMPANY,
by DILLS, MUECKE AND SCHELKER.

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers,
by HORNBLOWER, MILLER, MILLER & BOSTON.

320 *Summons (Vacating Order).*

WILLIAM ROBERTS, as Receiver,
by HUGHES, SCHURMAN AND DWIGHT.

J. P. MORGAN and others as the Committee constituted by and acting under the Deposit Agreement, dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes; and
J. P. MORGAN and others, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Bonds,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

321 CHARLES HAYDEN and others as a Committee for the protection of Ten-Year Six Per Cent. Gold Notes due October 1, 1932 of the Interborough Rapid Transit Company,
by ROOT, CLARK & BUCKNER.

VAN SANTVOORD MERLE-SMITH and others, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds due April 1, 1990,
by COTTON, FRANKLIN, WRIGHT & GORDON.

GUARANTY TRUST COMPANY OF NEW YORK,
2322 as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company, dated March 20, 1913,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

*Solicitors.*

Service accepted this 20th day of October, 1932 and joinder in said appeal is hereby refused.

MARSHALL & WEHLE,
Solicitors for Protective Committee for the 7% Guaranteed Stock of the Manhattan Railway Company, on grounds stated in annexed memorandum.

*Summons (Vacating Order).*

ARTHUR J. W. HILLY,
Corporation Counsel of The City of New York.

DAVIES, AUERBACH AND CORNELL,
Solicitors for Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of the Manhattan Railway Company.

The intervenors, HAROLD PALMER and others, as the Protective Committee for Manhattan Railway Company 7% Guaranteed Stock, by Marshall & Wehle, their Solicitors, in connection with the foregoing statement of "refusal" to join in the petition of Interborough Rapid Transit Company and others, for allowance of appeals, state that such "refusal" is upon the following grounds, among others: *first*, that their substantive rights as set forth by them in cause E-70-364 have not been adversely affected by the orders which are the subject of said petitions for appeal; *second*, that in cause E-71-153 they filed on September 29, 1932, their petition praying for an order allowing intervention in the event that the District Court in that cause should come to exercise jurisdiction of the receivership of Interborough Rapid Transit Company; and *third*, that their rights, if they are to be asserted through intervention, must be in subordination to whatever cause, in which the District Court finally exercises jurisdiction over receivers of said Company.

October 20, 1932.

MARSHALL & WEHLE,
Solicitors for
Harold Palmer and others.

326 **ORDER OF SEVERANCE (VACATING ORDER).**

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

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| BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.* | IN EQUITY E. 71-153 |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | IN EQUITY E. 70-364 |
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153 |

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THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

INTERBOROUGH RAPID TRANSIT COMPANY,

MANHATTAN RAILWAY COMPANY,

VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., Receivers of the Interborough Rapid Transit Company,

WILLIAM ROBERTS, Receiver of the Manhattan Railway Company,

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

CHARLES HAYDEN, EARLE BAILIE, GRAYSON M.-P. MURPHY, ALBERT H. WIGGIN AND WILLIS D. WOOD, as Committee for the Protection of the Holders of Ten-Year 6% Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company,

VAN SANTVOORD MERLE-SMITH, WALTER BENNETT, PHILIP A. BENSON, FRED J. FULLER and JAMES LEE LOOMIS, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds,

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913,

appellants, having presented their petition for appeal from an order made and entered on the 18th day of October, 1932 in the above entitled consolidated cause vacating certain orders made by Hon. Martin T. Manton,

*Order of Severance (Vacating Order).*

United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364," and it appearing that Harold Palmer, Norman Johnson, Stanley H. Latshaw, Harold Shaw and John W. Appell, Junior, acting as a Protective Committee for the 7% Guaranteed Stock of Manhattan Railway Company, intervenor in the above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364," and The City of New York, one of the defendants in the above entitled cause of "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E 71-153," and Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company, an intervenor in the above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364" have been duly notified and requested by the solicitors for said appellants to join in said petition for appeal and have failed or refused to join therein, the said appellants are hereby granted the right to appeal alone without joining said Harold Palmer, Norman Johnson, Stanley H. Latshaw, Harold Shaw and John W. Appell, Junior, acting as a Protective Committee for the 7% Guaranteed Stock of Manhattan Railway Company, said The City of New York and said Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company, as appellants.

Dated, New York, October 20th, 1932.

ROBERT P. PATTERSON,
United States District Judge.

## PETITION FOR APPEAL FROM ORDER OF OCTOBER 18, 1932 (VACATING ORDER).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

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| BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.* | IN EQUITY E. 71-153. |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | IN EQUITY E. 70-364. |
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153. |

TO THE HONORABLE ROBERT P. PATTERSON, JUDGE OF SAID COURT:

The petition of the undersigned enumerated parties respectfully shows:—

*Petition for Appeal From Order of October 18, 1932 (Vacating Order).*

Your petitioners (without recognizing or acknowledging that there is any such cause validly pending in this Court as "In the Matter of the Interborough-Manhattan Receivership Proceedings, In Equity E 71-153") pray that they may be permitted to take an appeal to the United States Circuit Court of Appeals for the Second Circuit from the order entered in the District Court of the United States for the Southern District of New York, on the 18th day of October, 1932, vacating and setting aside certain orders made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364", and the proceedings had prior thereto, for the reasons specified in the Assignment of Errors which is filed herewith, and your petitioners pray that this appeal may be allowed, that a citation issue, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Your petitioner, The American Brake Shoe and Foundry Company, is complainant in the above entitled cause In Equity E 70-364 and is a defendant in the cause In Equity E 71-153; your petitioners, Interborough Rapid Transit Company and Manhattan Railway Company, are defendants in both of the causes first above entitled; your petitioners, Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of Interborough Rapid Transit Company, and William Roberts, as Receiver of Manhattan Railway Company, are defendants in the above entitled cause In Equity E 71-153; your petitioners, J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann

*Petition for Appeal From Order of October 18, 1932 (Vacating Order).*

Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, are, as such Committee, a party defendant in the above entitled cause In Equity E 70-364; your petitioners, J. P. Morgan, Arthur M. Anderson, Frederic W. Allen, George F. Baker, Edward D. Duffield, F. H. Ecker, Halstead G. Freeman, Darwin P. Kingsley, G. Hermann Kinnicutt, H. C. McEldowney and Charles E. Mitchell, as the Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds, are, as such Committee, a party defendant in the above entitled cause In Equity E 70-364; your petitioners, Charles Hayden, Earle Bailie, Grayson M.-P. Murphy, Albert H. Wiggin and Willis D. Wood, constituting a Committee for the protection of the holders of the Ten-Year Six Per Cent. Gold Notes due October 1, 1932, are, as such Committee, a party defendant in the above entitled cause In Equity E 70-364; your petitioners, Van Santvoord Merle-Smith, Walter Bennett, Philip A. Benson, Fred J. Fuller and James Lee Loomis, constituting a Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds due April 1, 1990, are, as such Committee, a party defendant in the above entitled cause In Equity E 70-364; your petitioner Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company, dated March 20, 1913, is a party to the above entitled cause In Equity E 70-364 by reason of an order made and entered therein on September 28, 1932.

Dated, October 20th, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
by BREED, ABBOTT AND MORGAN.

*Petition for Appeal From Order of October 18, 1932 (Vacating Order).*

INTERBOROUGH RAPID TRANSIT COMPANY,
by JAMES L. QUACKENBUSH.

MANHATTAN RAILWAY COMPANY,
by DILLS, MUECKE AND SCHELKER.

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers,
by HORNBLOWER, MILLER, MILLER & BOSTON.

WILLIAM ROBERTS, as Receiver,
by HUGHES, SCHURMAN AND DWIGHT.

J. P. MORGAN and others, as Committees as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

CHARLES HAYDEN and others, as Committee as above,
by ROOT, CLARK & BUCKNER.

VAN SANTVOORD MERLE-SMITH and others, as Committee as above,
by COTTON, FRANKLIN, WRIGHT & GORDON.

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

*Solicitors.*

Appeal allowed this 20th day of October, 1932, upon giving bond as required by law in the sum of Two Hundred and Fifty dollars.

ROBERT P. PATTERSON,
U. S. District Judge.

## Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.* | IN EQUITY E. 71-153 |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | IN EQUITY E. 70-364 |
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153 |

Now come

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

INTERBOROUGH RAPID TRANSIT COMPANY,

MANHATTAN RAILWAY COMPANY,

VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., Receivers of the Interborough Rapid Transit Company,

*Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).*

WILLIAM ROBERTS, Receiver of the Manhattan Railway Company,

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

CHARLES HAYDEN, EARLE BAILIE, GRAYSON M.-P. MURPHY, ALBERT H. WIGGIN AND WILLIS D. WOOD, as Committee for the Protection of the Holders of Ten-Year 6% Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company,

VAN SANTVOORD MERLE-SMITH, WALTER BENNETT, PHILIP A. BENSON, FRED J. FULLER and JAMES LEE LOOMIS, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds,

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913,

as appellants (without recognizing or acknowledging that there is any such cause validly pending in this Court as

*Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).*

"In the Matter of the Interborough-Manhattan Receivership Proceedings, E. 71-153") and file the following Assignment of Errors upon which they will rely in the appeal herewith petitioned for from the order of this Court made on the 18th day of October, 1932, vacating and setting aside certain orders made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364" (said order appealed from being hereinafter for convenience sake referred to as the "Vacating Order") and the proceedings had prior thereto:

1. That the Court erred in making said order of October 18, 1932 (Vacating Order).

2. That the Court erred in granting the motions made by the complainant, Benjamin F. Johnson, and the intervenor, Lillian Boehm, in the equity cause of Benjamin F. Johnson, Complainant, against Manhattan Railway Company, Defendant, et al., E 71-153-1932 to the extent indicated in said order.

3. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order dated August 26th, 1932, appointing Victor J. Dowling and Thomas E. Murray, Jr., as

*Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).*

Temporary Receivers of Interborough Rapid Transit Company.

4. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order filed August 26th, 1932, retaining Chadbourne, Stanchfield & Levy, Esqs., as solicitors and general counsel for Victor J. Dowling and Thomas E. Murray, Jr., as Temporary Receivers of the Interborough Rapid Transit Company.

5. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order filed August 29th, 1932, appointing a Protective Committee for Tort Creditors.

6. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interbor-

ough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order dated and filed September 1st, 1932, granting leave to intervene to Committee for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bond Holders.

7. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order dated and filed September 1st, 1932, granting leave to intervene to Committee for Interborough Rapid Transit Company Ten Year Secured Convertible 7% Gold Note Holders.

8. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order filed September 2nd, 1932, granting leave to intervene to Committee for Interborough Rapid Transit Company Ten Year 6% Gold Note Holders.

9. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton,

*Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).*

United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order dated and filed September 6th, 1932, appointing William Roberts as Temporary Receiver of Manhattan Railway Company.

10. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order dated and filed September 6th, 1932, granting leave to intervene to Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bond Holders.

11. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order filed September 7th, 1932, retaining Hughes, Schurman & Dwight, Esqs., as attorneys for the Manhattan Receiver, William Roberts.

*Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).*

12. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order filed September 9th, 1932, amending Order of August 29th, 1932, appointing Creditors' Committee.

13. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order (#6) filed September 12th, 1932, that all papers and documents filed be numbered.

14. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order (#7) filed September 12th, 1932, granting leave to Receivers to maintain printed record of all documents.

*Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).*

15. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order (#8) filed September 12th, 1932, authorizing Receivers to pay necessary expenses.

16. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order (#9) filed September 14th, 1932, for Receivers not to pay Franchise Tax.

17. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order dated September 19th, 1932, permitting Central Hanover Bank and Trust Company as Trustee under Consolidated Mortgage of Manhattan Railway Company to intervene.

*Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).*

18. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order (#17) filed September 27th, 1932, employing Southern District Court reporters.

19. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order filed September 28th, 1932, granting leave to Central Hanover Bank and Trust Company to join receivers of Manhattan Railway Company and Interborough Rapid Transit Company as parties defendant to complaint to be filed.

20. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

74 *Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).*

Order filed September 29th, 1932, granting leave to the Protective Committee for Manhattan Railway Company 7% Guaranteed Stockholders to intervene.

21. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American
75 Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

Order dated September 28th, 1932, and filed September 29th, 1932, continuing the Receiverships of Interborough Rapid Transit Company and Manhattan Railway Company.

22. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern Dis-
376 trict of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

Order filed October 4th, 1932, restraining receivers of Interborough Rapid Transit Company from paying taxes as indicated.

23. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake

Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order filed October 4th, 1932, directing the receivers to take no action to secure the return to them of any sinking fund moneys now held by Guaranty Trust Company.

24. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order filed October 11th, 1932, accepting resignation of Chadbourne, Stanchfield & Levy, Esqs., as attorneys for the receivers of Interborough Rapid Transit Company.

25. That the Court erred in vacating and setting aside the following order made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364:—

> Order filed October 11th, 1932, appointing Hornblower, Miller, Miller & Boston, Esqs., as attorneys for the receivers of Interborough Rapid Transit Company.

*Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).*

26. That the Court erred in vacating and setting aside an order described in the Vacating Order as:—

> Any order which may be filed in conformance to opinion #1, 7401 by Judge Martin T. Manton, filed October 11th, 1932.

27. That the Court erred in making an order vacating and setting aside order or orders described in the Vacating Order as:—

> Any and all other or further orders made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on or after August 26th, 1932, in this Court, in the cause of The American Brake Shoe and Foundry Company against Interborough Rapid Transit Company, Manhattan Railway Company, Intervenor (Equity No. 70-364), dealing with the Interborough Rapid Transit Company, and/or the Manhattan Railway Company.

28. That the Court erred in its said order of October 18, 1932 (Vacating Order) in thereby dissolving or modifying the injunctions contained in the orders made by the United States District Court for the Southern District of New York on the 26th day of August, 1932 and September 28, 1932, in the above entitled cause, In Equity E. 70-364 signed by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, appointing receivers of the Interborough Rapid Transit Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the Receivers were appointed and giving other relief.

*Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).*

29. That the Court erred in making and entering said order of October 18, 1932 (Vacating Order) in violation of the terms and provisions of said orders made in the above entitled cause In Equity E 70-364 by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on the 26th day of August, 1932 and the 28th day of September, 1932.

30. That the Court erred in its said order of October 18, 1932 (Vacating Order) in thereby dissolving or modifying the injunctions contained in the orders made by the United States District Court for the Southern District of New York on the 6th day of September, 1932 and on the 28th day of September, 1932 in the above entitled cause In Equity E. 70-364 signed by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, appointing a Receiver for the Manhattan Railway Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the said Receiver was appointed and giving other relief.

31. That the Court erred in making said order of October 18, 1932 in violation of the terms and provisions of the said orders made in the above entitled cause In Equity E. 70-364 by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on the 6th day of September, 1932 and on the 28th day of September, 1932.

32. That the Court erred in making the order of September 20, 1932 in said cause In Equity No. E 71-153 signed by the Hon. Francis G. Caffey.

*Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).*

33. That the Court erred in its said order of September 20, 1932 in granting leave to the complainant, Benjamin F. Johnson, in said suit In Equity No. E 71-153, to file in the United States District Court for the Southern District of New York the bill of complaint mentioned in the petition of said Benjamin F. Johnson referred to in said order, and to make the Interborough Rapid Transit Company, the Manhattan Railway Company and their respective Receivers among the parties defendant to said bill of complaint mentioned in said petition.

34. That the Court erred in holding that it had jurisdiction or power or authority to enter the said order of September 20, 1932 in said cause No. E 71-153.

35. That the Court erred in its said order of September 20, 1932 in thereby dissolving or modifying the injunctions contained in the order made by the United States District Court for the Southern District of New York on the 26th day of August, 1932, in the above entitled case, In Equity (E. 70-364) signed by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, appointing receivers of the Interborough Rapid Transit Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the Receivers were appointed and giving other relief.

36. That the Court erred in its said order of September 20, 1932, in thereby dissolving or modifying the injunctions contained in the order made by the United States District Court for the Southern District of New York on the 6th day of September, 1932 in the above entitled cause In Equity E. 70-364 signed by Hon.

*Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).*

Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, appointing a Receiver for the Manhattan Railway Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the said Receiver was appointed and giving other relief.

37. That the Court erred in making its said order of September 20, 1932 in violation of the terms and provisions of said order made in the above entitled cause In Equity E. 70-364 by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on the 26th day of August, 1932.

38. That the Court erred in making its said order of September 20, 1932 in violation of the terms and provisions of said order made in the above entitled cause In Equity E 70-364 by the Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on the 6th day of September, 1932.

39. That the Court erred in making the order in the above entitled cause In Equity E 71-153 on the 18th day of October, 1932 and in the above entitled cause In Equity E 70-364 consolidating the two said causes into one cause under the title of "In the Matter of the Interborough-Manhattan Receivership Proceedings", In Equity E 71-153 (said order for convenience being herein sometimes referred to as the "Consolidation Order").

40. That the Court erred in making the said order of October 18, 1932 (Consolidation Order) in thereby dis-

solving or modifying injunctions contained in the orders made and entered in the above entitled cause of "The American Brake Shoe and Foundry Company, Complainant, *v.* Interborough Rapid Transit Company, Defendant, In Equity E. 70-364," by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on August 26, 1932 and on September 28, 1932 appointing Receivers of the Interborough Rapid Transit Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the Receivers were appointed and giving other relief.

41. That the Court erred in making the said order of October 18, 1932 (Consolidation Order) in violation of the orders made and entered in the above entitled cause of The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364, by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on August 26, 1932, and on September 28, 1932, appointing Receivers of the Interborough Rapid Transit Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the Receivers were appointed and giving other relief.

42. That the Court erred in its said order of October 18, 1932 (Consolidation Order) in thereby dissolving or modifying the injunctions contained in the orders made by the United States District Court for the Southern District of New York on the 6th day of September, 1932 and on the 28th day of September, 1932 in the above entitled

cause In Equity E. 70-364 signed by Hon. Martin T. Manton, United States Circuit Judge duly designated to hold a District Court of the United States for the Southern District of New York, appointing a Receiver for the Manhattan Railway Company and enjoining all persons whomsoever from interfering with the possession and management of the property over which the said Receiver was appointed and giving other relief.

43. That the Court erred in making and entering said order of October 18, 1932 (Consolidation Order) in violation of the terms and provisions of the said orders made in the above entitled cause In Equity E. 70-364 by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, on the 6th day of September, 1932 and on the 28th day of September, 1932.

44. That the Court erred in holding that it had jurisdiction to make said order of October 18, 1932 (Consolidation Order).

45. That the Court erred in holding that the two causes In Equity No. E 70-364 and No. E 71-153 were so related as to make it reasonable or appropriate that they be consolidated.

46. That the Court erred in consolidating the two causes In Equity E 70-364 and E 71-153 as a medium of getting the said two independent suits united so that the parties plaintiff in the said cause In Equity E 71-153 might thereby claim to have acquired a standing as plaintiffs or intervenors or otherwise in said cause In Equity E 70-364 which would entitle them to take pro-

ceedings in said cause In Equity 70-364 as if they were parties or intervenors therein.

47. That the Court erred in holding that by consolidating the said two causes In Equity E 70-364 and E 71-153 it thereby obtained power to properly make an order in the Johnson Cause In Equity 71-153 which would affect the receivership orders and the other orders made in The American Brake Shoe and Foundry Company case In Equity E 70-364.

48. That the Court erred in holding that inasmuch as the said consolidation order was made by the Court on its own initiative, complainants Benjamin F. Johnson and Lillian Boehm in said cause In Equity E 71-153 were left free to challenge the jurisdiction of Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York.

49. That the Court erred in holding that upon the consolidation of the said two causes In Equity No. E. 70-364 and No. E. 71-153, or otherwise the plaintiffs in the Johnson suit, In Equity E. 71-153 acquired a *locus standi* to apply for an order vacating the orders of the Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, above mentioned.

50. That the Court erred in holding that the above mentioned orders made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, were wholly void and of no juridical effect.

*Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).*

51. That the Court erred in holding that it had jurisdiction to set aside and vacate the aforementioned orders made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York.

52. That the Court erred in holding that the General Rule of the United States District Court for the Southern District of New York designated as 1-A was a valid or effective limitation of the jurisdiction, power or authority of Hon. Martin T. Manton, as United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, to make the orders above mentioned.

53. That the Court erred in holding that the General Rule of the United States District Court for the Southern District of New York designated as 11-A was a valid or effective limitation of the jurisdiction, power or authority of Hon. Martin T. Manton, as United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, to make the orders above mentioned.

54. That the Court erred in holding that the General Rule of the United States District Court for the Southern District of New York designated as 1-A was a valid rule.

55. That the Court erred in holding that the General Rule of the United States District Court for the Southern District of New York designated as 11-A was a valid rule.

56. That the Court erred in holding that Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the South-

404 *Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).*

ern District of New York, in making the said orders hereinabove referred to which are vacated by said order of this Court of October 18, 1932 (Vacating Order) did not act under the authority of the so-called blanket designation made by him on March 20, 1930.

57. That the Court erred in holding that the General Rules of the United States District Court for the Southern District of New York designated as 1-A and 11-A prevented Hon. Martin T. Manton, United States Circuit
405 Judge designated to hold a District Court of the United States for the Southern District of New York, from acting under the so-called blanket designation made by him on March 20, 1930.

58. That the Court erred in holding that the bills of complaint of said Benjamin F. Johnson in the cause of "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E. 71-153," as supplemented, state facts sufficient to constitute a cause of action.

59. That the Court erred in holding that upon the
406 allegations of the bill of complaint and the supplemental bill of complaint of Benjamin F. Johnson and the supplemental bill of complaint of Lillian Boehm in said cause In Equity E. 71-153, complainants were entitled to maintain a suit in equity although essential allegations were shown to be without foundation by answering affidavits.

60. That the Court erred in holding that upon the consolidation of the said two causes in Equity No. E. 70-364 and E. 71-153, the said order of the Court made on October 18, 1932 (Vacating Order), would not be a col-

lateral attack on the above mentioned orders of the Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York.

61. That the Court erred in holding that the Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, exceeded his statutory authority as Senior Circuit Judge when, in the designation order of August 25, 1932, he assigned himself particularly to hear and determine all the proceedings in the matter of The American Brake Shoe and Foundry Company against the Interborough Rapid Transit Company.

62. That the Court erred in holding that the order made by the Hon. Martin T. Manton, as Senior Circuit Judge, on August 25, 1932, referred to as the Division of Business Order, was entirely void so far as its having any effect on the rules of the United States District Court for the Southern District of New York, or on the division of business in said Court.

63. That the Court erred in holding that the order of Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, appointing receivers of the Interborough Rapid Transit Company and Manhattan Railway Company, in the cause In Equity No. E. 70-364, and all other proceedings had by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, under said order in said Court, were not proceedings before a judge *de jure*

410 *Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).*

or before a judge *de facto*, but were acts which involved an usurpation of power.

64. That the Court erred in holding that the cause entitled Benjamin F. Johnson, Complainant, against Manhattan Railway Company, Defendant, In Equity No. E. 71-153, as the same stood in this Court on October 18, 1932, is within the jurisdiction of the United States District Court.

411 65. That the Court erred in holding that the cause entitled "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, Defendant, In Equity No. E 71-153", is within the jurisdiction of the Court, notwithstanding the intervention of Lillian Boehm, a citizen and resident of the State of New York, as a party plaintiff, with the consent of the plaintiff, Benjamin F. Johnson.

WHEREFORE, said appellants pray that the said order may be reversed and for such other and further relief as to the Court may seem just and proper.

New York, N. Y.
412 October 20th, 1932.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
by BREED, ABBOTT AND MORGAN.

INTERBOROUGH RAPID TRANSIT COMPANY,
by JAMES L. QUACKENBUSH.

MANHATTAN RAILWAY COMPANY,
by DILLS, MUECKE AND SCHELKER.

VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Receivers,
by HORNBLOWER, MILLER, MILLER & BOSTON.

*Assignment of Errors on Appeal From Order of October 18, 1932 (Vacating Order).* 24

WILLIAM ROBERTS, as Receiver,
by HUGHES, SCHURMAN AND DWIGHT.

J. P. MORGAN and others, as Committees as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

CHARLES HAYDEN and others, as Committee as above,
by ROOT, CLARK & BUCKNER.

VAN SANTVOORD MERLE-SMITH and others, as Committee as above, 24
by COTTON, FRANKLIN, WRIGHT & GORDON.

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee as above,
by DAVIS, POLK, WARDWELL, GARDINER & REED.

*Solicitors.*

**BOND ON APPEAL.**

The appellants' bond on appeal in the sum of $250 was duly approved and filed, and the printing of the same in the record was waived. 241

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## CITATION ON APPEAL (VACATING ORDER).

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.,* *Defendants.* | IN EQUITY E. 71-153 |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | IN EQUITY E. 70-364 |
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153 |

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UNITED STATES OF AMERICA: ss.

TO: BENJAMIN F. JOHNSON, THE CITY OF NEW YORK, and LILLIAN BOEHM, and NATHAN L. AMSTER, MORTON F. STERN, HON. PETER TEN EYCK, C. R. JEFFERS, Secretary, BLIN W. PAGE and CHARLES FRANKLIN, attorney for said Committee, as a Manhattan Railway Company Common Stockholders' Protective

Committee, and HAROLD PALMER, NORMAN JOHNSON, STANLEY H. LATSHAW, HAROLD SHAW and JOHN W. APPELL, JUNIOR, acting as a Protective Committee for the 7% Guaranteed Stock of Manhattan Railway Company, and CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee under the Consolidated Mortgage of Manhattan Railway Company, appellees,

GREETING:

You and each of you are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Second Circuit to be held at the Borough of Manhattan, City of New York, on the 20th day of November, 1932, pursuant to an order allowing an appeal from an order vacating certain orders theretofore made by Hon. Martin T. Manton, United States Circuit Judge designated to hold a District Court of the United States for the Southern District of New York, in the cause entitled "The American Brake Shoe and Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E 70-364," made and entered on the 18th day of October, 1932 in the District Court of the United States for the Southern District of New York, in a suit wherein

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

INTERBOROUGH RAPID TRANSIT COMPANY,

MANHATTAN RAILWAY COMPANY,

VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., Receivers of the Interborough Rapid Transit Company,

WILLIAM ROBERTS, Receiver of the Manhattan Railway Company,

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER,

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HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES E. MITCHELL, as the Committee constituted by and acting under the Deposit Agreement dated as of July 19, 1932, for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes.

J. P. MORGAN, ARTHUR M. ANDERSON, FREDERIC W. ALLEN, GEORGE F. BAKER, EDWARD D. DUFFIELD, F. H. ECKER, HALSTEAD G. FREEMAN, DARWIN P. KINGSLEY, G. HERMANN KINNICUTT, H. C. MCELDOWNEY AND CHARLES
423 E. MITCHELL, as the Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

CHARLES HAYDEN, EARLE BAILIE, GRAYSON M.-P. MURPHY, ALBERT H. WIGGIN AND WILLIS D. WOOD, as Committee for the Protection of the Holders of Ten-Year 6% Gold Notes due October 1, 1932, of the Interborough Rapid Transit Company,

VAN SANTVOORD MERLE-SMITH, WALTER BENNETT, PHILIP A. BENSON, FRED J. FULLER and JAMES LEE LOOMIS, as the Protective Committee for the Manhattan Railway Company Consolidated Mortgage Gold 4%
424 Bonds,

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under the First and Refunding Mortgage of Interborough Rapid Transit Company, dated March 20, 1913,

are appellants and you are appellees, to show cause, if any there be, why said order rendered against said appellants, should not be corrected, and why speedy justice should not be done to the parties on that behalf.

WITNESS, Honorable Robert P. Patterson, District Judge, this 20th day of October in the year of our Lord,

One Thousand Nine Hundred and Thirty-two and of the Independence of the United States of America the One hundred Fifty-seventh.

ROBERT P. PATTERSON,
U. S. District Judge.

Service of a copy of the foregoing citation is acknowledged this 20th day of October, 1932.

CHARLES FRANKLIN,
Solicitor for Benjamin F. Johnson; and Nathan L. Amster and others, as Committee as above.

ARTHUR J. W. HILLY,
Corporation Counsel of The City of New York.

BOEHM & ZEIGER,
Solicitors for Lillian Boehm.

MARSHALL & WEHLE,
Solicitors for Harold Palmer and others, as Committee as above.

DAVIES, AUERBACH & CORNELL,
Solicitors for Central Hanover Bank & Trust Company, as Trustee as above.

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IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.*, *Defendants.* | IN EQUITY E. 71-153 |
| 429 THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | IN EQUITY E. 70-364 |
| IN THE MATTER *of the* 430 INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153 |

IT IS HEREBY CONSENTED AND AGREED by the solicitors for the appellees that the printing of the appellants' bonds on appeal in the record be and the same hereby is waived.

Dated: October 22, 1932.

24

CHARLES FRANKLIN
Solicitor for Appellees Benjamin F. Johnson; and Nathan L. Amster and others, as Manhattan Railway Company Common Stockholders' Protective Committee.

BOEHM & ZEIGER
Solicitors for Appellee Lillian Boehm.

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MARSHALL & WEHLE
Solicitors for Appellees Harold Palmer and others, as Protective Committee for Seven Per Cent. Guaranteed Stock of Manhattan Railway Company.

DAVIES, AUERBACH & CORNELL
Solicitors for Appellee-Appellant Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company.

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2434 **Minutes of Hearing Before Judge Woolsey October 4, 1932.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BENJAMIN F. JOHNSON,
Complainant,
*vs.*

MANHATTAN RAILWAY COMPANY, subject to leave of Court; WILLIAM
2435 ROBERTS, as Temporary Receiver of Manhattan Railway Company, Interborough Rapid Transit Company, subject to leave of Court; VICTOR J. DOWLING and THOMAS E. MURRAY, JR., as Temporary Receivers of Interborough Rapid Transit Company, THE CITY OF NEW YORK and AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Defendants.

IN EQUITY 71-153

2436

Before: HON. JOHN M. WOOLSEY, *District Judge.*

NEW YORK, OCTOBER 4, 1932.

APPEARANCES:

CHARLES FRANKLIN, Esq., Solicitor for Complainant.

LOUIS BOEHM, Esq., Solicitor and Counsel for Lillian Boehm, intervenor.

LLOYD PAUL STRYKER, Esq., Solicitor and Counsel for holders of the ten-year, 6% Gold Notes Committee of Interborough Rapid Transit Company.

BREED, ABBOTT & MORGAN, Esqrs., Solicitors for The American Brake Shoe & Foundry Company, Complainant,
By PARIS S. RUSSELL, Counsel.

CHADBOURNE, STANCHFIELD & LEVY, Esqrs., Solicitors for the Receivers of the Interborough Rapid Transit Company, Messrs. Dowling and Murray,
WILLIAM GUTHRIE, Esq., and
WILLIAM WALLACE, Esq., Counsel.

JAMES L. QUACKENBUSH, Esq., Solicitor for the Interborough Rapid Transit Company.

ARTHUR J. W. HILLY, Esq., Corporation Counsel of The City of New York,
F. E. CARSTARPHEN, Esq.,
EDWARD J. KOHLER, Esq., and
HARRY HERTZOFF, Esq., of Counsel.

LAWRENCE BERENSON, Esq., Solicitor for Complainant in an action entitled Barber *vs.* Manhattan Elevated R. R. Co., the Interborough Rapid Transit Company and the Receivers of the Interborough Rapid Transit Co.

DILLS, MUECKE & SHELKER, Esqrs., Solicitors for Manhattan Railway Company,
JACK J. LAWRENCE, Esq., Counsel.

ELON S. HOBBS, Esq., Solicitor for Independent Security Holders who have not filed their securities with Protective Committee, but have filed a petition.

LOUIS B. WEHLE, Esq., Solicitor for the Guaranteed Stock Stockholders Committee.

DAVIS, POLK, WARDWELL, GARDINER & REED, Solicitors for the 7% Note Holders' Committee and 5%

*Minutes of Hearing Before Woolsey, J., October 4, 1932.*

Bondholders' Committee, both Committees of Interborough Rapid Transit Company securities, Edwin S. S. Sunderland, Esq., Counsel.

Mr. Franklin: If there are no other appearances, your Honor——

The Court: I assume we have them all. We want a complete record. And I assume that everyone who has appeared and has given his name is a member of the Bar of this Court.

Mr. Hobbs: If your Honor please, as I understand all those who have appeared so far either represent the various corporations or so-called protective committees. Can those, that is, we who are not depositing with committees our securities, but have securities in these properties appear on our own behalf and those who desire to join with us, who are individuals?

The Court: If you have some basis for your appearance.

Mr. Hobbs: We have a basis in this: that I represent Manhattan shareholders and own some myself.

The Court: Are you a party to any proceeding in the case at present or have you filed any papers?

Mr. Hobbs: I filed a petition in the other proceeding which was denied from which at present no appeal has been taken. By the way we hardly know where we want to turn just now.

The Court: I see no reason why you should not enter an appearance on the record here if that is the case.

Mr. Hobbs: Elson S. Hobbs, for Independent Security Holders who have not filed their securities with the Protective Committee.

The Court: But have filed a petition in this case?

Mr. Hobbs: Filed a petition.

The Court: What is the name of the other case. I mean the number of the other case. Equity what?

Mr. Hobbs: I do not recall the name or number of the case, if your Honor please. My petition was denied and I have not decided whether I shall appeal or not.

Mr. James P. Kohler: I would like to have my appearance noted. I am an attorney of this Court and I appear in person as a stockholder of the Interborough and the Elevated. James P. Kohler.

The Court: Yes, but have you filed any petition in the case?

Mr. Kohler: I have not filed anything yet.

The Court: This is not a proceeding in that sense. I do not think I can take your appearance.

Mr. Wehle: Louis B. Wehle appears for the Guaranteed Stock of Stockholders Committee. We have filed a petition.

Mr. Sunderland: I desire to enter the appearance of Davis, Polk, Wardwell, Gardiner & Reed, by Edwin S. S. Sunderland appearing in behalf of the 7% Note Holders' Committee and 5% Bondholders' Committee, both Committees of Interborough Rapid Transit Company securities who are parties to the entire proceeding.

The Court: Are those all the appearances?

(No response.)

The Court: All right.

Mr. Franklin: I was telephoned yesterday afternoon by Charles H. Tuttle that the merits of the proceeding would be adjourned until probably Thursday. So my remarks will be directed simply to the question of whether the application should be heard by the full Bench.

The Court: Yes; that is right. I told Mr. Tuttle we would do that. He wanted to go up to the Republican Convention as he was free from the Davis case. If he did not go up they might think that he was sort of sulking in his tent.

Mr. Franklin: He told me that. Now, if the Court please, it is granted in advance that this is a discre-

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tionary matter with the Court. We know that we are not entitled to have a proceeding of even this unusual character heard by the entire District Court Bench. We have been unable to find any authority in the books which justify a litigant to ask to have an application, regardless of its importance, heard before the full bench, but I myself had cases in the Eastern District where the Court sat en banc because of certain facts that had been developed. Those were three accident cases in which I was acting as counsel for the Southern Pacific. They involved rather important amounts. Certain statements had been
447 made, and the Judge hearing the motion, as your Honor is, decided that the entire bench was involved and he directed me to present an application in connection with my proceedings to have this attorney disbarred from practice. I was also requested to notify the Bar Association, sitting in Brooklyn, and Meyer Steinbrink, now Justice Steinbrink, was present and also represented other associations.

Here we have a most unusual situation One of the chief points that will be taken up when we come to argue the case on Thursday is whether there was an actual disagreement among the eight Judges of this Court.
448 Some of the orders that were made were specifically based upon that premise. I know of no practice by which an attorney can ask Judges to furnish affidavits, or even to make statements that would be acceptable that would become a part of the record in a case of this kind, as to whether or not there was a disagreement among the Judges. We know that was not from things that have been said to me. Therefore, and in view of the importance of the case we asked, in both orders to show cause, that this application be heard by the full Bench.

The Court: Do you give any reason why? One might poll one's colleagues, so to speak, in order to find out

whether we had any disagreement, a vote viva voce with all the judges present, so to speak. I could make a deposition on the subject and then judge it myself.

Mr. Franklin: Yes. I think that practice is usually deprecated; to ask a judge to make affidavits.

The Court: No, but for one judge to ask another or ask all of his colleagues, of course we could do that.

Mr. Franklin: This is our thought: In view of the importance of the case, and in view of the fact that the jurisdiction of Judge Manton will depend itself on whether there was an actual disagreement among the judges in this court it seemed to us at least that the other judges should be asked to sit by invitation when the matter came up.

Now, taking even Section 23 of the Judicial Code which is one of the statutes that are directly involved in the case——

The Court: That is "Division of Business".

Mr. Franklin: That is right. It is stated there that in districts like where they have more than one district judge, like the district here, the judges may agree upon the division of business. We took that into account. We said here was a case that involved the entire bench. There was a question of fact involved. True, the matter is purely discretionary. We say that this is a proper case in which that discretion should be exercised in favor of allowing the judges to sit, if only as friends of the Court. I think it would simplify the proceeding, and there are certain efforts in connection with the procedure that I think should commend itself to a court of equity. But beyond the three cases I cited—I remember one of the names, *Rauches* vs. *Southern Pacific Company;* the other was *Martinez*, and the other *William McManus*, and in those cases the senior judge in Brooklyn definitely decided that the matter should be heard en banc, and I think in view of that, and without going into the merits

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of the case, that it would be right to do it in this case, but, first and last, we know that it is purely a discretionary matter.

Mr. Boehm: If your Honor please, I am joining in Mr. Franklin's motion; that this motion shall be heard before the full bench. We believe that the property rights involved, as well as the importance of the question to the Court itself, aside from the property rights involved, justifies the full bench in hearing this motion.

In the first place we have a situation where property worth roughly $400,000,000 is involved in this receiver-
453 ship. We have the question as to whether the receiverships who were appointed by Judge Manton, have been properly appointed by him or not; whether they are in fact receivers of this vast transit system; whether they are in fact rightfully collecting millions of dollars each week in fares; whether the other orders which have been made by Judge Manton, such as the order which I understand was made yesterday requiring the payment of interest upon the Manhattan bonds; whether the orders which I understand are to be made, according to this morning's newspapers, appointing Samuel Seabury as master to hear the question of the termination of the
454 lease from the Interborough Rapid Transit Company to the Manhattan Railway Company; whether the order making the receiverships permanent, and whether the various other orders which must be made in this highly important litigation, and the validity of which is called into question here—whether those orders are valid or invalid is a matter of great public importance; not only to the security holders of the Interborough and of the Manhattan, but also to the public at large.

In addition to that we have the situation where there is or may be a conflict as to the jurisdiction of the judges of this court. Judge Manton this motion directly attacks,—the validity of Judge Manton's order designat-

ing himself to sit, or to hold the term of the District Court; it directly attacks the validity of the order of Judge Manton in which he disagrees with the other judges of this court as to the disposition of business. It directly attacks his right to disagree as to the division of business and it directly affects the procedure and administration of justice of this court. It is an unprecedented situation in this district, and so far as I know it is an unprecedented situation in any other district, and we say, in view of the importance of this matter and the vast amounts of money involved to the security holders of these companies, the interest of the public which is involved, the interest of the Court which is involved, that if ever there was a case, a proper case, where the motion should be heard by the full bench, this is the case.

Now we think that the Judges of this court have the right to hear this motion en banc, because Section 23 of the Judicial Code says that in districts having more than one district judge the judges may agree upon the division of business and assignment of cases for trial in said district. That is to say, they may make such assignments as they see fit amongst themselves, and if they consider the case of sufficient importance they may all sit upon a particular case which they consider of requisite importance for that purpose.

Of course we think that they should sit as judges of the court. I think on that all of the judges should act as the court in hearing this motion, but, of course, as Mr. Franklin has said, this matter is discretionary with your Honor and with the other judges of the court, and if your Honor prefers you may have them sit in an advisory capacity with you and make the order as your order; or, you may have them sit as the court making the order in this case, but we do submit that this is a matter of sufficient importance, if there ever was such a matter,

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as to require the hearing of this motion by all the judges of this court.

Mr. Franklin: May I make one suggestion, if the Court please: I particularly mentioned the fact that the case on the merits was adjourned until Thursday. I had in mind that that would give your Honor an opportunity to talk to the other judges to see whether, under that particular clause, it would not be right to order the court to sit en banc.

Mr. Guthrie: May it please the Court: I think I am
59 voicing the views of all the defendants when I state that we are not prepared to take the responsibility of agreeing to the establishment of any such precedent as is urged upon you here. Of course no statutory authority exists for it, and there is no precedent. The precedent in the Eastern District, when the court was considering the disbarment of an officer of the court, as to which all the judges had more or less knowledge, is, of course, no precedent at all. The suggestion that has been made that there is a question of fact as to whether the eight appointed District Judges, agreed to Rules 1-A and 11-A, is an error. There is no question of fact in regard to that. Those rules were published over the signatures of the
60 eight District Judges. It is simply preposterous to say—

The Court: I understood his point was that there was a disagreement as to the division of business, and not as to the rules having indicated a division.

Mr. Guthrie: But there is no disagreement as to the division of business.

The Court: But I say that was one of the points he was raising; that there had not been a disagreement as to division of business as was recited in some order. You see I have been away on a holiday and I knew nothing about the orders. I have never read the orders to show cause even.

Mr. Guthrie: The only suggestion of disagreement is that the senior Circuit Judge, when he designated himself to hold a district court under the authority of the statute, entered an order in which he stated that he did not agree with the provisions in regard to the division of judicial business contained in those rules.

The Court: That was after he had joined the court?

Mr. Guthrie: After he had joined the court. Of course your Honor realizes that if, in every case where an attorney or a party shows that large and important interests are involved, you are to be called upon to ask the assistance of your seven associates who sit here en banc to hear them, we would have a practice that would be quite anomalous, and a practice that would have very little justification in the due administration of justice.

The Court: Well, it will destroy the progress of other parts of the court entirely. Of course it does not seem to me, Mr. Guthrie,—I do not want to interrupt, but I do not think I need hear this any longer,—it seems to me this is a very important case, and I think that if, as Mr. Franklin suggests, there were ever a case where it is necessary to get more than one district judge to sit in it, this would seem that it might be such a case, and I cannot say that there might not be such cases; one can never visualize what cases can arise, or, another might conceive that on the facts, as such, there might be some necessity, but to others it might be obvious that it might not be at all necessary. In this case it seems to me unnecessary. I am the motion Judge here, and exercising my discretion, and I am going to hear this motion on the merits myself and I am going to hear it at ten-thirty on Thursday morning in this room. I should, accordingly, appreciate it if the parties would have their briefs ready by that time. My idea of the way that we ought to do it is that if we have the authorities, and I should suppose there would be very few that would have very much

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bearing on it, we could get the books down and our hearing then would be something like the hearings in an English court; that is, a conference between counsel and the court, and, if possible, we might arrive at a decision that day, or, at any rate shortly thereafter. Consequently that is the disposition I make of the case. I adjourn this motion then until ten-thirty o'clock on Thursday morning.

(Adjourned to Thursday, October 6, 1932, at 10:30 o'clock A. M.)

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## Minutes of Hearing Before Judge Woolsey, October 6, 1932.

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| BENJAMIN F. JOHNSON<br>*vs.*<br>MANHATTAN RAILWAY CO., Etc., et al. | IN EQUITY<br>71-153 |

Before: HON. JOHN M. WOOLSEY, District Judge.

NEW YORK, OCTOBER 6, 1932.

APPEARANCES:

CHARLES FRANKLIN, Esq., Solicitor for Complainant.

LOUIS BOEHM, Esq., Solicitor and Counsel for Lillian Boehm, intervenor.

LLOYD PAUL STRYKER, Esq., Solicitor and Counsel for holders of the ten-year 6% Gold Notes Committee of Interborough Rapid Transit Company.

BREED, ABBOTT & MORGAN, Esqrs., Solicitors for The American Brake Shoe & Foundry Company, Complainant,
CHARLES H. TUTTLE, Esq.,
W. K. PETTIGRUE, Esq.,
PARIS S. RUSSELL, Esq., Counsel.

HUGHES, SCHURMAN & DWIGHT, Esqrs., Solicitors for William Roberts, Receiver of Manhattan Railway Company,
CHARLES E. HUGHES, JR., Esq.,
ALLEN S. HUBBARD, Esq., Counsel.

CHADBOURNE, STANCHFIELD & LEVY, Esqrs., Solicitors for the Receivers of the Interborough Rapid Transit Company, Messrs. Dowling and Murray,
WILLIAM D. GUTHRIE, Esq.,
WILLIAM WALLACE, Esq.,
J. ARTHUR LEVE, Esq.,
JEROME N. FRANK, Esq., Counsel.

JAMES L. QUACKENBUSH, Esq., Solicitor for the Interborough Rapid Transit Company.

ARTHUR J. W. HILLY, Esq., Corporation Counsel of
2471 The City of New York,
F. E. CARSTARPHEN, Esq.,
EDGAR J. KOHLER, Esq.,
HARRY HERTZOFF, Esq., Counsel.

COTTON, FRANKLIN, WRIGHT & GORDON, Esqrs., Solicitors for Protective Committee of Manhattan Consolidated 4's,
CLIFTON MURPHY, Esq.,
B. C. WRIGHT, Esq., Counsel.

LAWRENCE BERENSON, Esq., Solicitor for Complainant in an action entitled Barber *vs.* Manhattan
2472 Elevated R. R. Co., the Interborough Rapid Transit Company and the Receivers of the Interborough Rapid Transit Co.

DILLS, MUECKE & SHELKER, Esqrs., Solicitors for Manhattan Railway Company,
JACK J. LAWRENCE, Esq., Counsel.

ELON S. HOBBS, Esq., Solicitor for Independent Security Holders who have not filed their securities with Protective Committee, but have filed a petition.

LOUIS B. WEHLE, Esq., Solicitor for the Guaranteed Stock Stockholders Committee,
NORMAN JOHNSON, Esq., Counsel.

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DAVIS, POLK, WARDWELL, GARDINER & REED, Esqrs., Solicitors for the 7% Note Holders' Committee and 5% Bondholders' Committee, both Committees of Interborough Rapid Transit Company securities,
EDWIN S. S. SUNDERLAND, Esq., Counsel.

JOHN J. CURTIN, Esq., Appearing specially for the Transit Commission,
GEORGE H. STOVER, Esq., Counsel.

DAVIES, AUERBACH & CORNELL, Esqrs., Solicitors for Central Hanover Bank & Trust Co.,
HAROLD C. MCCOLLOM, Esq., Counsel.

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The Court: Have you got your orders to show cause?

Mr. Franklin: Yes, your Honor, the orders to show cause are right there under the brief, together with an extra copy of the bill supplemental and supplementary.

Mr. Boehm: Here is another order to show cause.

The Court: Mr. Guthrie, are these four all yours?

Mr. Tuttle: I have some here that, if it is appropriate, I will hand up at this time—our affidavits, and attached to them a printed copy of the proceedings of the receivership so far, and also certain exhibits attached to the affidavit and our brief.

The Court: What I was inquiring about, there are four copies of a brief. Is that yours, Mr. Guthrie, a printed brief?

Mr. Guthrie: I believe so, and there are several other briefs.

The Court: I see. There are four copies there.

Mr. Tuttle: The brief that is being handed up now is for the complainant, The American Brake Shoe Company, and affidavits which are being submitted in that connection.

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The Court: All right. Now this is your petition?

Mr. Tuttle: Yes, sir. An affidavit we have submitted.

The Court: That is typewritten?

Mr. Tuttle: The typewritten one. There wasn't time to print that. That is a supplemental affidavit, supplemental to the printed affidavit which you have in your hand, sir.

The Court: That is the printed affidavit (exhibiting)?

Mr. Tuttle: Yes, sir. The typewritten one is supplemental to it.

The Court: And that incorporates this large book
477 by reference to it?

Mr. Tuttle: Yes, sir, incorporated them all.

The Court: Well, now, let me get the three—are there three orders to show cause?

Mr. Franklin: Two orders to show cause in behalf of the plaintiff Johnson and then one in behalf of Lillian Boehm.

The Court: Let us see. This is the Boehm. If I just get the papers arranged, it will be easier for me to follow what you say. And this is another of yours, and this is the other (exhibiting)?

Mr. Franklin: The first was by Judge Caffey and the second by Judge Bondy, the first was dated Sept. 21st.
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The Court: Are these copies of——

Mr. Franklin: Those are copies of the bills, plaintiffs bills in the case, together with our briefs.

The Court: Now, was there an intervention by Boehm?

Mr. Franklin: There was one intervention, and you also have a copy of that.

Mr. Boehm: There was an intervention by Boehm as a bondholder of Interborough.

The Court: There was an intervention. Have I a copy of that brief?

Mr. Boehm: The order of intervention is on file, the original was.

The Court: I know, but I asked you whether I have a copy of the supplemental brief.

Mr. Boehm: I will submit that, your Honor.

The Court: I think we ought to have all those other papers brought up, Mr. Clerk.

Mr. Hughes: If your Honor please, I have an affidavit here of William Roberts, the Receiver of the Manhattan Railway Company, covering the matters that concern him. I may say that this does not include matters relating to the new supplemental petition that was filed by the complainant, a bill of the complainant which, as I understand it, was filed only this morning and was not served on us, and of which I received a copy only about ten minutes ago. Naturally there has not been any opportunity to consider or deal with that.

The Court: Was there an order permitting that intervention?

Mr. Hughes: That was not intervention, your Honor, as I understand it.

Mr. Franklin: It is a supplemental petition like the affidavits that we have received. All of the affidavits from the other side, and some are very voluminous, were handed in just a few moments ago. We would, of course, ask an opportunity to make reply, if reply is necessary. We have not had an opportunity, could not physically read the immense amount of documents that have been handed to us. But the supplemental petition referred to covers facts that we ascertained yesterday. Petitions were filed and we have given copies to the other side. We assume that when they get ready they will have full opportunity to make reply to it.

The Court: Yes, but is it ready now to go on this morning?

Mr. Tuttle: This supplemental petition was just handed to us five minutes ago and we have had no opportunity to examine it, we don't know whether the facts

supposed to be alleged are actual or not. We may wish to object to it on a number of grounds, and we desire to reserve that right, and also the privilege to answer it if there is anything material found. We can't stop now and read such a voluminous paper.

The Court: And they can't stop now to read yours.

Mr. Tuttle: No.

The Court: And I should suppose that you can tell as the argument proceeded whether any questions of fact have to be dealt with and we could, if necessary, adjourn the argument when it is finished, but it may be it will
83 boil itself down to some question of law; I don't know.

Mr. Tuttle: There is this difference between our papers which we are serving and theirs: This supplemental petition apparently, from a hasty glance, is designed to broaden the situation which we have been called upon to meet here. We were prepared to meet the situation as presented by the papers theretofore served upon us. This supplemental petition apparently calls upon us to meet other matters. Our affidavits which we served on them are merely in reply to the charges in their former papers.

Mr. Franklin: We think that the new petition and all
84 the facts there come within the original and supplemental bill.

Mr. Tuttle: We wish to reserve our rights in that respect.

The Court: Well I know; it is all very well to reserve your rights, but I want to conserve my time. I may sit here all day and then find at the end of it that there is some loose thread involved, and I would a great deal rather adjourn this hearing until Saturday, say, and hear it then if there is any question of having to take another bite at it. I would like to have the whole thing through with and the argument over.

Mr. Boehm: Well, if your Honor desires to have all the papers before you, my suggestion would be that that

be done, because we have been served with voluminous affidavits this morning that we have not had a chance to read, to which we may want to reply; they may want to reply to our supplemental petition, and obviously that matter cannot be submitted today to your Honor.

Mr Tuttle: I suggest that your Honor consider from the argument whether this does not come down to questions of law. A hasty glance at that supplemental petition seems to indicate that it is directed to the propriety of the selection of an individual receiver. Now, it seems to me, as I intimated, that that may be an entirely immaterial and irrelevant consideration, because if there is 2
power to appoint a receiver, the question of the personnel of the receiver is an entirely different matter, not running to jurisdiction, and should be presented by these parties in that particular suit. If they desire to question this selection that has actually been made of any individual receiver, I should think that such a question would not be involved here, and that therefore the whole supplemental petition, if I have correctly diagnosed the case at a hasty glance, would be entirely immaterial and not relevant to the questions of law which are to be presented.

The Court: Well, I think you are right, Mr. Tuttle, from these prayers of the orders to show cause, and I 24
think probably the best thing to do would be to go along with the argument and see how it develops. If it is purely a question of law, of course it would not be necessary to go into that. At any rate I did not understand that any of the questions of personnel of the receivership would be raised today,—unless they do it under the general prayer of their motion. And I think we better go on.

Mr. Franklin: If the Court please, may I ask whether any time limit is going to be made on counsel? I want——

The Court: Absolutely none. I am prepared to sit here until seven o'clock tonight.

Mr. Franklin: Thank you.

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The Court: So that everybody will have a full chance to say anything they properly should say.

Mr. Franklin: If the Court please, by the two orders to show cause, the complainant here asks that this Court vacate and set aside certain orders made by Senior Circuit Judge Manton, appointing receivers for the Interborough Rapid Transit Company and the Manhattan Railway Company. These appointments were made in an equity cause entitled "American Brake Shoe Company *vs.* Interborough Rapid Transit Company." It is our contention that Judge Manton was without authority
489 or power to entertain that bill or to appoint the receivers. We also ask that this Court on this bill take judicial custody of the Interborough Rapid Transit Company and the Manhattan El. and appoint new and independent receivers for both companies.

The complainant, who is a resident of Kentucky, brings this suit in his derivative right as a Manhattan stockholder, and as between this complainant and each of the defendants there is diversity of citizenship. I should also like to add that since our bill was filed approximately $15,000,000 of stock of the Manhattan Railway Company and of the Interborough, and some bondholders, have
490 intervened in this proceeding.

The Court: What was your original amount?

Mr. Franklin: 100 shares. That is, Mr. Johnson is a record holder of 100 shares of Manhattan stock. But as your Honor well knows, in suits of this nature, the entire corporate assets and not the value of complainant's holdings represent the amount involved and in controversy. Of course Mr. Johnson's own holdings would come to $10,000.

If the Court please, we feel that if our contention is correct, that Judge Manton was without power to act officially in this case, then it would obviously be to the advantage of all of the interested parties, including the

security holders and the receivers and their solicitors, to have that matter determined at the outset, rather than hazard the risk of having an appellate court, say, make such a holding say a few months or a few years hence, because the question of jurisdiction is necessarily fundamental and can be raised at any time.

The Court: I should suppose you would put in your order a request—I think you have in your order to show cause, but you have not in your argument, the first thing you move to set aside the order by which Judge Manton designated himself.

Mr. Franklin: Yes.

The Court: To sit in the district court?

Mr. Franklin: Yes.

The Court: That is the first step, is it?

Mr. Franklin: Yes. There was certain incidental relief of that character that we asked, but our position is that if it is held that Judge Manton was without power to entertain the suit or to appoint the receivers, then all of the incidental relief would fall as a natural result, because there would be the—I am coming to that in just a moment.

The Court: I know, but I would just like to have these things developed in orderly fashion.

Mr. Franklin, Yes.

The Court: The first thing you sought was to set aside the receivership orders, and I think the way in which you should deal with the thing, the first question is the question of Judge Manton's assignment of himself, and you haven't even got that.

Mr. Franklin: I think your Honor is entirely correct about that, and I wish to do so.

The Court: Yes, let us do that in an orderly fashion, because it is so confusing if you get into the zone in which it is purely discretionary.

Mr. Franklin: Now, then, your Honor, we have also asked to vacate and set aside the order of Judge Manton dated August 25, 1932, designating himself for a period of thirty days to hear or pass on equity receivership applications, and also the order by which he designated himself as a District Court Judge to particularly hear and determine the application of the American Brake Shoe case.

The Court: All right.

Mr. Franklin: Both were made on the same day.

The Court: I suppose I am the only person in this room, all the counsel must have seen these, but I have not, as I told you before, I have been away on my holiday and this is all perfectly virgin ground to me and I would like very much to read those two orders so I can see what you are talking about exactly.

Mr. Franklin: Yes, sir.

Mr. Tuttle: They are the first two pages in Exhibit A, the big book.

Mr. Franklin: I think you will find that I handed up to your Honor copies of those two orders.

The Court: Well, read them, because I won't take notice. You read them.

Mr. Franklin: Yes.

The Court: What is the date of the first one?

Mr. Franklin: August 25, 1932. This was an order entitled "In the Matter of Division of Business and Assignment of Cases for Trial in the Southern District of New York", and reads as follows:

The Court: August 25?

Mr. Franklin: That is right.

The Court: All right.

Mr. Franklin (Reading):——

Mr. Tuttle: I do not want to interrupt, but that is not the first one. This designating order was the first order.

The Court: Now read that one.

Mr. Franklin: All right. This is an order dated August 25, 1932, reading as follows:

"Whereas, the undersigned as Senior Circuit Judge of the Second Judicial Circuit of the United States, is empowered and authorized by law, pursuant to the provisions of Title 28, Section 22 of the Code of Laws of the United States of America, if the public interest so requires, to designate and assign any Circuit Judge of the Second Judicial Circuit to hold a District Court within such Circuit; and

Whereas, the undersigned, as such Senior Circuit Judge, finds that the public interest requires that Martin T. Manton, a Circuit Judge of the Second Judicial Circuit, be designated and assigned as a Circuit Judge of this Judicial Circuit to hold a District Court within such Circuit, it is hereby

Ordered, adjudged and decreed, that the said Martin T. Manton be and he hereby is designated and assigned to hold a District Court of the United States for the Southern District of New York, Second Judicial Circuit, during the period beginning August 25, 1932, and particularly to hear and determine all applications and proceedings in the matter entitled *American Brake Shoe and Foundry Co.* vs. *Interborough Rapid Transit Company*, and for such further time as may be required to complete unfinished business."

This is dated New York, August 25, 1932 and signed, Martin T. Manton, Senior Circuit Judge for the Second Judicial Circuit.

The Court: All right. We will refer to that hereafter, just to save trouble, as the order of designation, if you have to talk about it. What is the other order? Another order on the same day.

Mr. Franklin: Another order was made on the same day which was entitled "In the United States Circuit Court of Appeals, Second Judicial Circuit. In the mat-

ter of the Division of Business and Assignment of Cases for Trial in the Southern District of New York.

"Whereas, Martin T. Manton has been duly designated and assigned to hold a District Court of the United States for the Southern District of New York within this Second Judicial Circuit for a period of thirty days from this day; and

"Whereas, Section 23 of the Judicial Code (Mar. 3, 1919, c. 231, Sec. 23, 36 Stat. 1090) provides that 'In Districts having more than one District Judge, the judges may agree upon a division of business and assignment of cases for trial in said District; but in case they do not so agree, the Senior Circuit Judge of the Circuit in which the District lies shall make all necessary orders for the division of business and the assignment of cases for trial in said District'; and

"Whereas, Martin T. Manton, a Circuit Judge of the Second Judicial Circuit of the United States designated and assigned to hold a District Court in the Southern District of New York in said Circuit, and acting as District Judge for the Southern District of New York in this Second Judicial Circuit, does not agree upon the division of business and assignment of cases for trial in the Southern District of New York as provided in and pursuant to the rules of court for the Southern District of New York heretofore adopted by the then United States District Judges for the Southern District of New York; it is hereby——

The Court: By the "then" United States District Judges?

Mr. Franklin: Yes. You see what Judge Manton did there was to appoint himself an additional Judge, and he refers there, and I will come to that in a moment——

The Court: He is still a United States District Judge, I should suppose.

Mr. Franklin (continuing reading): "Ordered, adjudged and decreed, for a period of thirty days beginning with this day, all applications for the appointment of receivers in equity causes in the Southern District of New York may be made not only to the District Judge designated to hear such application pursuant to Rule 11-A of the General Rules of the District Court for the Southern District of New York, but also to Martin T. Manton, Circuit Judge designated to act as District Judge to hold a District Court for the Southern District of New York."

This order is also dated New York, August 25, 1932 and is signed Martin T. Manton, without any designation.

The Court: Well, this venue, so to speak, is in the Circuit Court of Appeals and it is an order which I can take judicial notice of. It is an order issued by him as Senior Circuit Judge, dividing the business, or purporting to divide the business, under Section 23?

Mr. Franklin: That is right. Now, if the Court please, at the time the American Brake Shoe bill——

The Court: I would like to ask a question.

Mr. Franklin: Certainly.

The Court: When was the bill in the American Brake Shoe and Foundry Company case filed in this court?

Mr. Franklin: It was filed on August 26, 1932, a day after this designation. I wanted to point out that at the time that he designated himself to act in this case, particularly to hear and determine all applications and proceedings in the matter entitled American Brake Shoe and Foundry Company against Interborough Rapid Transit Company that that matter was not in existence. It was not filed until the next day.

Mr. Tuttle: I think I ought to say that he is mistaken about that. The bill of complaint was presented to Judge Manton on August 25th.

The Court: It was not filed in court he said.

Mr. Franklin: It was not filed.

The Court: Exactly, and that is the first thing to do; to file the bill in court.

Mr. Tuttle: It was physically before Judge Manton.

The Court: Oh, it was physically before him. I suppose that we are dealing with a question like this strictí juris. The effect of whatever happens today will be, I suppose, so far as the District Court is concerned, to clear title and remove any questions about jurisdiction or change of jurisdiction or whatever may happen. I have not any preconception on the subject, but the point of the matter is that I have to deal with it as strictí juris. Now until any of these equity petitions for receivers were actually filed in court I do not think there is any case pending under the rules or requirements which are made for our court.

Mr. Tuttle: The only reason I arose was my friend said there was nothing before the Judge, and that form of expression——

The Court: No. I understood he said "filed".

Mr. Franklin: I said filed. There was not any action pending, because the petition had not been filed.

Now, if the Court please, on August 26th, 1932, when the bill of complaint of American Brake Shoe was filed, together with an answer thereto of the Interborough Rapid Transit Company consenting to a receivership, the following rule was in effect in this court. This is the rule that has already been referred to twice in the second order. This reads as follows:

"11-A. All applications for the appointment of receivers in equity causes, in bankruptcy causes, and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy Rules), shall be made to the Judge assigned to hold the Bankruptcy and Motion Part of the business of the court and to no other judge."

Now this rule was published in the Law Journal on July 9, 1932.

The Court: I was just wondering: of course it was a supplementary rule. It was not in the printed book. Go on.

Mr. Franklin: I wanted to point out that this rule has subscribed thereto the names of the eight District Judges.

The Court: I remember when it was passed. It was passed, signed, promulgated and published.

Mr. Franklin: Now the bill of American Brake Shoe and Foundry Company and the answer were not submitted to the District Judge who was holding the Motion Part on the day of submission, but was rather presented in the first instance to Senior Circuit Judge Manton. As I understand Judge Patterson was sitting in the Motion Part that week, and he was given no opportunity to consider or pass upon the application in any way. Coming now to the second of the orders, it is my understanding that there was no disagreement among the District Judges in the matter of division of business or assignment of cases for trial, and that, therefore, there was no occasion for invoking Section 23 of the Judicial Code which specifically states that the Judges may agree upon a division of business and assignment of causes, but in case the United States District Judges do not so agree——

The Court: "They." You are interpolating a parenthesis of your own?

Mr. Franklin: Yes. "In case they do not so agree, the Senior Circuit Judge of the Circuit in which the District lies, shall make all necessary orders for the division of business."

The Court: In other words, that section apparently contemplates the function of the Senior Circuit Judge as a peacemaker among the District Judges.

Mr. Franklin: Exactly. Exactly. That has occurred in one case in 14 Federal 2d——

The Court: Case against the United States?

Mr. Franklin: Yes. Case against the United States.

The Court: I know that case.

Mr. Franklin: Now in my study of the case I have looked upon this designation really as following the second order, although it was read first, and that is why I put it that way.

The Court: Yes, but he would not have been a District Judge in order to create the disagreement until he had been designated by himself to be a District Judge.

Mr. Franklin: Yes. You see in the first paper, which is called a designation, there they invoke a different section of the statute; what we call Section 18 of the Judicial Code.

The Court: Wait just a minute. Let me look at it. You are very familiar with it, you know. What section is that?

Mr. Franklin: Section 18 of the Judicial Code. It is also called Section 22 of the United States Code; Section 18 of the Judicial Code.

The Court: The first sentence of that provides "If the public interest requires the Senior Circuit Judge" shall assign one of his colleagues or any Circuit Judge to hold District Court.

Mr. Franklin: That is it. Now under the second order, getting back to it, what Judge Manton did in this case particularly was he recognized apparently that there was no disagreement among the eight District Judges, so it was his thought, apparently, or he thought what litigants thought, that the Senior Circuit Judge could appoint himself as an additional District Judge, and, having done that, that then he would declare that he disagrees with the other eight Judges and that is exactly what occurred in this case.

It seems to me that it does not require very much argument that if the right of that second order is to be based on the statutory provision which is quoted therein, that that would not be a reason, nor a sensible interpretation, because obviously the only purpose of the statute was to allow the Senior Circuit Judge, where a difference developed among Judges, to step in and make peace, so to speak, in dividing their business.

Now in the first order, the reference to public interest: it will be noted that Judge Manton states that he find the public interest requires. That apparently is based on a short affidavit that was filed by Mr. James L. Quackenbush at the time that the original bill and the answer were submitted to Judge Manton on August 26.

The Court: Now, be accurate. When you say "filed" you mean presented to Judge Manton with the original bill.

Mr. Franklin: That is right.

The Court: They had never gotten to the District Court at that time, had they? Is that in the papers somewhere?

Mr. Franklin: That is also in the big book.

The Court: What was the phrase used: "public emergency and public necessity?"

Mr. Franklin: I shall read it. It was very short.

The Court: No. I mean the phrase of the order.

Mr. Franklin: He finds that the public interest requires "that Martin T. Manton, a Circuit Judge of the Second Judicial Circuit, be designated and assigned as a Circuit Judge of this Judicial Circuit to hold a District Court within such Circuit". It is on page 27 of the book, Exhibit A to one of the affidavits.

You will notice, if the Court please, that it is stated on the second page, in the second paragraph,—I shall just refer to the pertinent provisions,—Mr. Quackenbush states that it is important and in the public interest that

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no receiver in the cause should be a trust company or any other corporation, but that the receiver or receivers should be an individual or individuals. I need not read the rest of it, and then a little further on, it is about four lines on, the affidavit continues: "That while in bankruptcy the appointment of a trust company as receiver might be advisable such is not the case in respect to a railroad of the size, importance and character of the defendant."

The Court: Laboring under the delusion that we have a rule requiring the appointment of the Irving Trust
2519 Company in equity causes. We are absolutely free in these cases to do whatever we want to do. Sometimes we appoint the trust company and an individual, and sometimes we appoint an individual.

Mr. Franklin: Absolutely, and it is my feeling that this was a proper case for the appointment of individuals.

The Court: Obviously.

Mr. Franklin: But the District Judge holding the Motion Part was never given an opportunity to pass on that, or to consider it in any way. Now it is possible that Mr. Quackenbush thought Rule 27 of the Bankruptcy Rules applied, which, however, where it is a pub-
2520 lic service corporation——

The Court: Of course. The public service corporation are outside of bankruptcy.

Mr. Franklin: So it will be noted that there was no reference in this affidavit of Mr. Quackenbush about this matter having been submitted to the United States District Judge. Conceivably if they had taken this matter up with the District Judge holding the Motion Part, and that Judge, after considering the matter, gave them informal advice that he would probably appoint a corporate trustee, notwithstanding their plea, there might in some way come in the question of public interest, but here is the case where the entire United States District

Court, and particularly the Judge assigned to hold that part was completely disregarded.

The Court: Well, of course, when you say "completely disregarded" that is not the point. The question is whether he had a right to deal with a case which was a case which had not yet been filed in the District Court, and, when filed in the District Court it would be subject to be entirely dealt with by the District Court.

Mr. Franklin: That is exactly our point. Now, if the Court please, there are, oh, there is a wealth of cases which it is hardly necessary to go into at this time——

The Court: Nothing is more terrible than a wealth of cases. Give me one or two of them.

Mr. Franklin: Yes, but on the point that a rule, properly promulgated by the United States District Court, will be recognized not only by the litigants but by the Judges, and by the Appellate Courts, and the United States Supreme Court has gone so far as to say,—this is in the case *Weil against Neary*, 278 U. S., 160,—that a bankruptcy rule of the District Court forbidding trustees in bankruptcy to retain as their attorney, the attorney for the creditors, had the force of law.

Another case, with which your Honor must be very familiar because of the wonderful record and experience which your Honor had before coming on the Bench, is the case of *Galveston Dry Dock & Construction Company* v. *Standard Dredging Company*. That is reported in 40 Federal, (2d), 442, where it was held that Rule 29 of the Admiralty Rules of the Southern District of New York had the force of law, and that reviewing courts were as much bound to observe them as a statute.

The Court: Did you gentlemen exchange your briefs?

Mr. Franklin: Yes, we have. We received them this morning. Now, if the Court please, here is a case, as we point out in our original bill, that involves literally hundreds of millions of dollars. If we go back a little

while, we recall the Seven-Cent Fare case involving the same companies, where, after spending hundreds of thousands of dollars, in counsel fees, the case was thrown out eventually and the State Court was allowed to take hold. I believe that is an experience most lawyers have had, and I think it is most essential that this matter should be determined at this time——

The Court: Correct practice is just as important in a case involving five hundred dollars as five hundred million, but, of course, everybody is aware of the importance.

Mr. Franklin: Very true, except in this case I want
2525 to add, your Honor, that the I. R. T. Company, for example, is collecting approximately five million or six million dollars a month, there are a great many things being done in this transportation system, so if they found that these receivers were not properly appointed, there would be no end of waste of funds and property and energies.

If the Court please, this was not the only rule that was violated. We claim not only a violation of Rule 11-A —but while I am on this point I would like to call your Honor's attention to the fact that even if there was no rule, it is my understanding that it has always been the practice in this court, certainly as far as I can remember,
2526 and that is almost thirty years, that equity receivership applications are presented to the Judge holding the District Court, and I say even if there was no such rule that Senior Circuit Judge Manton would not have the right to step into a situation and take hold of a case of this kind, and appoint receivers in the first instance. Now Rule 11-A——

The Court: Is that printed in the book?

Mr. Franklin: I think so. It is in connection with the employment of solicitors for receivers.

The Court: That is the equity rule regarding employment of solicitors for receivers? That is under the equity rules, is it not?

Mr. Franklin: That is right. Now I call your Honor's attention to the first part of that rule which reads: "No solicitor shall be retained by the receiver unless his affidavit annexed to the petition of the receiver shall show to the best of his knowledge, his business, professional or other connection during one year prior and up to the date of the affidavit, the subject matter of the suit, the parties, the solicitors for the parties, any creditor of the defendant or any other person interested in the case or in the receivership estate."

Now, Mr. Chadbourne——

The Court: Of course that equity rule is under the Judicial Code and we have to have it passed upon by the Circuit Court of Appeals. So that rule was passed upon.

Mr. Franklin: Of course that is not a calendar rule.

The Court: Not a calendar rule. It is an equity rule.

Mr. Franklin: We urge and set forth in our bill and supplemental bill that the appointment of the firm of Chadbourne, Stanchfield & Levy was irregular and improper in that it violated the Rule 11 to which I have just referred.

The Court: You mean that the affidavit——

Mr. Franklin: That the affidavit was insufficient.

The Court: Who made the affidavit?

Mr. Franklin: Mr. Chadbourne. It is page 35 in the copy of the book you have.

I call to your Honor's attention that in paragraph 2 of this affidavit Mr. Chadbourne says: "That several members of the firm——"

The Court: I just read it.

Mr. Franklin: Well, I simply call to your Honor's attention that it appears from the affidavit that his firm and several members of the firm had contact with numerous legal problems in connection with the traction matters in the City of New York.

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Now we show in our bill, or supplemental bill, that three days or so before the receivership application was made to Senior Circuit Judge Manton, that Mr. Chadbourne acted as special counsel for the Brooklyn-Manhattan Transit Company, at a conference had with the Transit Commission of the State of New York. I only mention that because that is definitely of record, and I think I can say, without fear of contradiction, that Mr. Chadbourne and his firm have been special counsel for the Brooklyn-Manhattan Transit Company, the chairman of whose board is also the chairman of the Interborough
531 Rapid Transit Company, Mr. Dahl. So that there was a very close affiliation of interest there which, in my opinion, barred that firm from acting as solicitors for proper receivers of that company.

In addition to that there have been several cases,—I do not believe there is any rule on the question that this court or that the Federal Court will not appoint as receivers parties who are intimately connected with a particular property, but that practice was only recently condemned by Judge Sanborn in the case of May Hosiery Mill *v.* The Grand Five-and-Ten-Cent Stores.

The Court: I have my own personal point of view
532 about that sort of appointment; people that are connected with an organization, in an equity receivership, I must say that I am rather inhospitable to it. I do not see how you can say it is not done. A president of a corporation is often appointed with some other receiver. I mean I think Judge Sanborn's case was rather——

Mr. Franklin: Rather a caustic opinion?

The Court: Rather a caustic opinion, and I say, with all due respect, that it was an opinion not based on the spirit that is prevalent in the great metropolitan centers.

Mr. Franklin: Yes. If your Honor will let me read from one or two cases on the point. This is the case of

Finance Company *v.* Charleston Railroad Company, reported in 45 Fed. 436. There the Court held, page 438:

> "Unless in cases of imperative necessity, no person will be appointed receiver of a railroad company who is a party to, or of counsel in, the cause."

Now the receiver who was appointed for the Interborough Rapid Transit Company, rather one of them, is Victor J. Dowling, who was a member of the firm, or associated with the firm of Chadbourne, Stanchfield & Levy. We felt then, and we feel now, that it was improper to appoint as the receiver of this property a member of the law firm that had been doing work for that very company, and I believe that Judge Manton himself recognized this, because after Judge Dowling returned from Europe, I may say at the time of his appointment he was in Europe—after he returned Judge Manton held up the appointment of Judge Dowling until he could be furnished with an affidavit from the Judge as to when he severed his association or relations with that law firm. Such an affidavit was furnished, verified on September 23rd, 1932. He was appointed on August 26, 1932.

I am not going to make very much of a point of it, but I want to call to your Honor's attention that immediately after he was appointed receiver, all of the newspapers in the City reported a conference, or a——

The Court: I don't care anything about that. I will tell you, Mr. Franklin, it seems to me that the only question that it would be appropriate for me to deal with really on these questions is the question of the legality of these appointments. Now if it should be determined that what Judge Manton did in coming down, so to speak, to the District Court, and putting himself into the district group, and then making these orders in his

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other capacity as Senior Circuit Judge, about a disagreement, if that was a regularized procedure, and legal, and so forth, why then I suppose that what he did after that with regard to these appointments would be something that it might not lie in my province to interfere with. Suppose one of the regular District Judges appointed somebody else——

Mr. Franklin: I think in that case, if an appointment was made of that law firm and these receivers——

The Court: You would go to the Court of Appeals?

537 Mr. Franklin: Yes. We would probably have to take an appeal. And our bill sets forth the facts and we thought it was pertinent, and your Honor would be interested in knowing just what occurred.

Now we ask in our orders to show cause that the order appointing Victor J. Dowling as Receiver be vacated and set aside.

The Court: Of course, mind you, if the order of designation by Judge Manton constituting him a District Judge falls, the orders which he made subsequent to that would fall also. But they would fall for jurisdictional reasons; not for any reasons of whether he exercised his discretion rightly, or whether it was a wise appointment. I have nothing to do with that whatever.

538 Mr. Franklin: If the Court please, my thought was this: that since this effects and involves also a rule of this court that is, Rule 11 just referred to, that it was proper for this court, in considering the whole case, to also declare whether or not there was a violation of that rule in connection with the proceeding, and it was because of that that I felt it would be proper, simply because the bill asks for it, because the order to show cause referred to it, for your Honor to know just what happened in connection with the receivers. If your Honor decides, as your Honor may decide, that there was no authority for Judge Manton to act in the case, or to

make the designation, or to appoint the receiver, your Honor can limit the decision and probably would say that this makes it unnecessary for me to consider any of the other matters involved.

The Court: Oh, I see your point. Perhaps I did not grasp it before. You mean if it should be held that this appointment was legal, that is, jurisdictional, and there was no infirmity of jurisdiction in it, in that case then I would be in position to vacate the orders entered because they did not comply with the rule?

Mr. Franklin: No. I cannot claim that.

The Court: No. Of course not. It would be incredible.

Mr. Franklin: No, I would not contend that.

The Court: No. You would have a condition of chaos.

Mr. Franklin: No. It is well established in this court, and I think by rule, that once a Judge entertains a case and makes rulings, that he is in position to complete it.

The Court: It is a fixed rule now I understand.

Mr. Franklin: So I understand.

The Court: What we are seeking in cases of this kind is a meticulous orderly proceeding. That is what we are trying to arrive at with our new rules and that is one of the most important things in the world, because everyone knows how, when you have to go from one court to another, oftentimes a Judge is in Europe and somebody has to come to another Judge in one of his receiverships, and it is so inconvenient for counsel. There is a long story to be told and it is impossible, so that sort of thing is really individualized, and centralized, so to express it as much as possible so that the proceeding will run along between two banks. Of course if one is away in Europe or something of that kind that is another matter.

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Mr. Franklin: This will greatly simplify my argument, as I expected to tell the Court about some of the things that have already occurred, and really with the thought of bringing to the Court's attention some matters which I think now are unnecessary to show that there was collusion here; that this receivership was hatched months before the papers were filed; that these receivers and their attorneys and others knew about it, and I was going to submit certain facts which are now unnecessary.

The Court: Yes, but just *en passant*, since the Manhattan Railway receivership which my former firm ar-
543 gued in the Supreme Court, I do not see what you mean by collusion. I suppose if there was jurisdiction it makes no difference——

Mr. Franklin: Yes, but——

The Court: Do not let us go into that, but I say off hand that it does not seem to me it does make much difference.

Mr. Franklin: This is a matter we can take up at another time.

The Court: I am not deciding anything on it but I am saying let us get down to the only thing that I feel myself is judicial propriety for me to deal with, and
544 the only thing I feel I can properly deal with under the circumstances, and that is the sole question of the legality of Judge Manton's actions in those orders that he entered. That is the foundation of the whole situation.

Mr. Franklin: Certainly. If there was no authority there everything else necessarily falls with it.

The Court: And if there was authority there everything must necessarily stand. The whole thing is hinged; that is the pivotal point in the whole arrangement, and if you have any argument to make on those questions, illustrative, or on the theory of this Federal Judicial Code, or anything like that, I think that would be the

thing to deal with. It really seems to me that is all you can do. This is not, as you may imagine, by any means a very agreeable assignment for me, but because I am here, by agreement among the District Judges made last summer, last June, and I think all on file, whereby I am assigned to sit in the Motion Part this month, I am dealing with this matter, therefore, as an ordinary motion, and I think that you have to be meticulously careful in what I might call judicial manners, not to overstep what you should do, and consequently I am quite frank to say that that particular question, the jurisdictional question we will call it, although perhaps it is not properly described as jurisdictional, but that is an easy word that people think they understand is the one that we should confine ourselves to only and I will hear anything more that you want to say about that.

Mr. Franklin: First I want your Honor to understand that it is also difficult and embarrassing for a lawyer to present a matter of this kind because it refers to a high judge.

The Court: I quite agree that it is a delicate matter, and will have to be dealt with by all parties with the utmost good humor and wisdom. That is all there is to do. We will just have to deal with it that way. I am not criticizing your argument, but I say that we have plenty to do in determining that question and I do not want to have you go off on questions that I could not determine if I tried to.

Mr. Franklin: Then I would like to conclude my argument by pointing out, which is probably unnecessary, that we feel that there is an important issue here in that it is important,—unnecessary for me to have to tell it to this Court,—that there should not be any overstepping, as your Honor just said, from one judge on to another. In other words, that there should not be any usurpation by

a judge sitting in a different branch of this court. That it is of the greatest importance——

The Court: What do you mean by "different branch of this court"?

Mr. Franklin: Well, I mean a judge sitting in the United States Circuit Court of Appeals.

The Court: That is not a branch of this court. It is an entirely separate court. They were founded in 1912 and we were founded in 1789; entirely different courts.

Mr. Franklin: I make the point that it is just as important for this court to prevent encroachments on its
549 powers, on its duties as is the necessity for keeping separate the judicial and legislative functions, and I think that ought to be taken into consideration by your Honor, as your Honor undoubtedly will, in passing on the point.

Now Mr. Boehm is associated with me and he has filed an intervention. If it is agreeable I would like Mr. Boehm to take the argument at this point.

I wanted to say this: Our brief refers to a number, I should say 50 to 75, of cases that will require some analysis if questions are brought up. It seemed to me proper in this situation merely to give to the court as full a presentation of the facts as I could. If necessary we can go into the cases, although I believe on account
50 of the voluminous papers filed, and I think I have myself received a half dozen printed briefs this morning which I would like to reply to, that it would be probably not practical to attempt to determine even the legal questions without a fuller opportunity to study the cases.

Mr. Boehm: May it please your Honor: I think your Honor is entirely correct in stating that the only question involved upon this motion is whether or not Judge Manton had the power to make the two orders which have been referred to, and whether, as a result of the two orders that he made he had the power to entertain the application of the Interborough Rapid Transit Com-

pany, or rather the American Brake Shoe & Foundry Company, for the appointment of a receiver of the Interborough Rapid Transit Company, and subsequently to permit the intervention of the Manhattan Railway Company and the application in that action for the appointment of a receiver of the Manhattan Railway Company.

Now that power is based, in the first place, upon Section 18 of the Judicial Code, which says that the Chief Justice of the United States, or the Circuit Judge of any Judicial Circuit, or the Senior Circuit Judge thereof may, if the public necessity requires, designate and assign any Circuit Judge of the Judicial Circuit to hold a District Court within such Circuit. Now your Honor will notice that the qualification there is that the Senior Circuit Judge may designate a Circuit Judge if the public interest requires it. That does not mean a private interest. That means a public interest. That does not mean the interest of one particular litigant. It means the interest of the public. What is the interest of the public that required Judge Manton to sign the order designating himself as a Judge of the Circuit Court to sit to hold the term of the District Court? It is not claimed that there was no District Judge who was ready to hear the application for the appointment of a receiver in the American Brake Shoe case. It is not claimed that the Judge who was then sitting in the Motion Part was disqualified from hearing that application; that he was biased or prejudiced or interested. There is no claim that the public business was so great that he could not entertain that application as well as the other applications that might be made before him, and those are the only public interests that I know of that would justify the designation of a Circuit Judge to sit and hold the term of the District Court.

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What was the purpose of Section 18 of the Judicial Code in providing that the Chief Justice, or the Circuit Justice or the Senior Circuit Judge might, if the public interest requires, designate another Circuit Judge to hold a term of the District Court? Was it not obviously to facilitate and expedite the business of the District Court? That if there was no Judge who could hold any particular term of the Court that it was necessary to hold that a Circuit Judge, who might not be so busy, should be assigned to hold that part of the Court or that term of the District Court; or, that if a particular Judge was
2555 disqualified for some reason, a Judge of the District Court, from holding a particular term, whether by illness or any other reason, that some Circuit Judge might be called in to help in the expedition and the transaction of the business of the District Court.

That was the only purpose of this section of the Judicial Code. There was not anything else to do, and before Judge Manton had the right to designate himself and to make the order of August 25, 1932, designating himself to hold a term of the District Court, it must appear that there was some public interest that required it, and I challenge my distinguished opponents to state what public interest required Judge Manton to designate him-
2556 self to hold the term of the District Court.

It has been suggested by Mr. Franklin that possibly the affidavit of Mr. Quackenbush had something to do with it. I do not think so. I cannot see anything in that affidavit that had anything to do with making the application to Judge Manton, or Judge Manton directing that the application should be before him, or designating himself a Judge of the District Court. In the first place, it was a private matter. The parties were private litigants. It was not a matter of public interest.

In the second place, there was nothing that appears in the equity rules of the District Court which prohibits,

as your Honor has pointed out, the appointment of individual receivers of corporations of this kind, and I thoroughly concur with what your Honor has said, that we should have individual receivers of these companies, but what we want, and what we contend for, are independent receivers who are not dominated by the Interborough interests or the Brooklyn-Manhattan interests, but who are acting independently in the interests of the security holders of these companies and in the interest of nobody else.

Then the next ruling, the next order, that Judge Manton has made, and the rule under which he made it, Rules 1-A and 11-A of the District Court, I think Mr. Franklin inadvertently omitted to call to your Honor's attention Rule 1-A of the District Court rules. It provides that any Judge designated to sit in the District Court for the Southern District of New York shall do such work only as may be assigned to him by the Senior District Judge. That is a rule of the Court unanimously concurred in by all of the Judges of the Court. In other words, the purpose of that rule was that nobody should step in and take upon himself the transaction of the public business of the Court, but that it should be done in an orderly way, and that the Senior District Judge shall be the one who shall assign the work among the Judges of this Court.

Then follows Rule 11-A which provides that all applications for the appointment of receivers shall be made to the Judge assigned to hold the Bankruptcy and Motion Part of the business of the Court and, "to no other Judges."

Those rules under the decisions of the United States Supreme Court have the force of statute. It is the same as though Congress had passed a statute, so far as the business of this Court is concerned, to the same effect as the rules adopted by the Court.

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Now in order to obviate and circumvent these two rules, Judge Manton has made the following order: This one is entitled in the American Brake Shoe & Foundry case and the other is not entitled in any case at all except that in the first order he mentions the suit of the American Brake Shoe & Foundry Company which was not then pending.

The Court: This is another order, is it?

Mr. Boehm: This is another order I am about to refer to. Of course, I may say that I doubt very seriously in the first place whether a Circuit Judge has the
2561 power to designate himself to sit in the District Court. But, passing that aside, I also question whether he has a right, in designating himself, to say that a particular application may be made before him, not to hold the term of the court to hear all applications that may be made, but a particular application, namely, the application of the American Brake Shoe & Foundry Company.

That is another very unusual and strange provision of this order, and I doubt very much, aside from his right to make the order at all, whether he would have the right to say, "This particular case may be heard before me", and say "I am just going to hear this case," and that is all he has heard. There is no claim that any other case
2562 was brought to him as a result of this designation.

Now the other order that he made recites: "Whereas, Martin T. Manton, a Circuit Judge of the Second Judicial Circuit of the United States designated and assigned to hold a District Court in the Southern District of New York in said Circuit, and acting as District Judge," in that he says he is acting as District Judge. Personally I do not think he is acting as District Judge.

The Court: What page is that on?

Mr. Boehm: Well, it is on page 2 of that large book your Honor has before you.

The Court: Page 2?

Mr. Boehm: Yes. That order entitled, "American Brake Shoe & Foundry Company vs. Interborough Rapid Transit Company."

The Court: Is that the same date; August 25th?

Mr. Boehm: The same date. (Continuing reading:) "Acting as District Judge for the Southern District of New York." I doubt very much whether he was acting as District Judge. He is simply a Circuit Judge holding a term of the District Court. It is not important at all, but I think he must be acting as District Judge.

It is not very important, but assuming he is acting as District Judge: (Continuing reading) "does not agree upon the division of business and assignment of cases for trial in the Southern District of New York as provided in and pursuant to the rules of court for the Southern District of New York heretofore adopted by the then United States District Judges for the Southern District of New York."

The Court: Is this not the same thing I have heard before?

Mr. Boehm: Yes, sir; I am just repeating it so as to make my argument clear to your Honor.

Then it is ordered that for a period of thirty days all applications for receivers in equity causes may be made before him.

Now that order is based upon Section 23 of the Judicial Code, or rather, made in view of Section 23 of the Judicial Code which provides that in districts having more than one District Judge, the Judges may agree upon the division of business and assignment of cases for trial in said District, but in case they do not so agree, the Senior Circuit Judge of the Circuit in which the District lies shall make all necessary orders for the division of business and the assignment of causes for trial in said district.

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What does that section mean? It means that should there be a disagreement among the eight Judges of the Court, so that the eight Judges of this Court can not agree among themselves as to how the business of the court shall be divided, that then the Senior Circuit Judge has the right to step in, and, in order to facilitate the orderly transaction of business of the court, and to prevent chaos in the transaction of the business of this court which would otherwise result if the Judges could not agree as to how they would divide the business of the court, that he is then permitted to step in and assign
567 the business of the court to the Judges.

The Court: What is your theory of the way such intervention is initiated?

Mr. Boehm: My opinion, my thought, is that the only way such an intervention may be initiated would be by the District Judges themselves going to the Circuit Judge and stating that "we can not agree as to how the business may be disposed of or divided, and we ask you, under this provision of the Code, to divide the business."

The Court: That is what was done in the Case v. United States, 14 Fed. (2d), where Judge Sanborn made an order dividing the Eastern District of Oklahoma in two divisions.

568 Mr. Boehm: Yes, sir. We have that case on our brief, your Honor, but it certainly never was intended that the Senior Circuit Judge might assign another Circuit Judge, or himself, as in this case, to hold a term of the District Court and then have him to say, "Now I am holding a term of the District Court and I do not agree with the Judges of the District Court as to how the business shall be assigned and divided. Therefore I designate that the application for the appointment of receivers in the particular case, and all other applications in that case, shall be made to me." If Judge Manton had the power to make an order of that kind he could just as

well yesterday have made an order designating himself to hold the motion part of this court, and directing that this application shall be heard before himself.

The Court: Well, of course——

Mr. Boehm: A question of propriety, of course, and he would have had the power if he had this power.

The Court: Power?

Mr. Boehm: I am addressing myself to power. And you will see to what an absurd conclusion such a theory could lead one; that he would practically have the right to step in and stop the business of the court and arrogate to himself the business of the court and the powers of the court. Well, that never was the intention of Section 23 of the Judicial Code. The intention of Section 23 of the Judicial Code was that the public business should be facilitated; that there should not be chaos; that there should not be disagreement among the Judges. The purpose of Section 23 was not to create disagreement, but to prevent disagreement and obviate disagreement, but Judge Manton has taken the very opposite to the purpose contemplated by Section 23 of the Judicial Code and he has designated himself to hold a term of the District Court, and, after having so designated himself, he has created that disagreement. So we say he has no such power; that that was not the intention of Section 23 of the Judicial Code; that it was not the purpose of Congress in enacting that statute so to create this disagreement where none existed, but that the purpose of Section 23 of the Judicial Code was to stop disagreement where it existed and to facilitate the transaction of the business of the court.

I think that sums up briefly—I do not want to make a lengthy argument here; unnecessarily so—but I think that sums up briefly the question involved here as to the power of Judge Manton. Of course if he had no power to designate himself; if there was no public interest which

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required the designation of himself to hold the term of the District Court, that order was void and must be vacated.

The Court: Yes, but the second order of August 25th——

Mr. Boehm: And I was about to proceed to that. If there was no disagreement among the eight Judges of this Court as to the assignment of business and the division of business, and I challenge my opponents to assert that there was any such disagreement; if there was no such disagreement he had no right to direct that this ap-
573 plication should be made to him in violation of the rules of this court, which provided that the business shall be divided by the Senior District Judge, and which provided further that all applications for the appointment of receivers shall be made to the Motion Judge.

We claim that he had no power to make either of those orders. We claim that he had no jurisdiction to sit; that he had no more right to sit in this court and ascend this Bench and to hear this application than if some citizen from City Hall Park were to ascend this Bench and say "I will hear this motion acting as a District Judge." We say that he was absolutely without jurisdiction and without power.

574 The Court: I suppose he cannot be subject to criminal prosecution for impersonating an officer of the United States.

Mr. Boehm: No, it does not go as far as that, but if he was without power, all orders appointing the receivers and all the subsequent orders that he made in connection with the receivership are mere nullities. They are not made by the District Court at all. They are not made by a court of competent jurisdiction. They are mere pieces of waste paper and we ask, therefore, in view of the great interest, both private and public, involved in this situation that the District Court take jurisdiction of

this case where it properly belongs, and that it appoint independent receivers both of the Interborough and of the Manhattan.

And when I say independent, I mean independent of domination of any interests which might be inimical to the security holders of these two companies; independent of domination of the B-M T., which may have an adverse interest in connection with this situation; independent of the bankers who have been associated with this situation and whose acts may be questioned, and independent of any domination by anybody. In other words, we want receivers who are free to act as the merits of the situation justify.

Mr. Franklin: If the Court please, there is one point which I would like to call to your Honor's attention. It is in connection with our second order to show cause. If your Honor will examine the second order, that is the one other than the designation on pages 2 and 3——

The Court: The second order to show cause?

Mr. Franklin: Yes. The second order to show cause.

The Court: Who signed that?

Mr. Franklin: That was signed by Judge Bondy. I want to call to your Honor's attention that the order of Judge Manton of August 25th, on pages 2 and 3, specifically states in the first preamble, referring to his designation, on page 1, "Martin J. Manton has been designated", but at the end of that paragraph, "for a period of thirty days beginning with this day". In the order itself it is stated: "Ordered, adjudged and decreed, for a period of thirty days beginning with this day, all applications for receivers" and so forth, may be presented under Rule 11-A or to Judge Manton.

Now that order is dated August 25th, and thirty days from August 25th would be September 24th or September 25th, but, according to his very order his term of office, so to speak, or his term of new office, expired within that

thirty-day period, and yet, without any other designation, without any other order, on September 28th, after the expiration of the thirty-day period, Judge Manton made a sweeping order in which he designates himself; he extends the term for a period of at least three years and continues the receivership, and I think that point, too, merits your Honor's very careful consideration.

The Court: Well, I suppose that competence on September 24th continued over to September 28th; it would not be like the extension of a term of court. Perhaps he might only decide to visit the court occasionally and appoint himself on the occasion when he wanted to come down, so I do not think there is very much in that point. It does not seem to me so offhand.

Mr. Franklin: It seemed to me there should have been a designation and it should have been within thirty days when he is making the designation as Senior Circuit Judge. When he is making a designation as Senior Circuit Judge it does not make him a District Judge. I think the point should be mentioned. It is one of the irregularities that ordinarily finds one if we do not begin right.

The Court: We will now take a five-minute recess.

(Short recess.)

Mr. Tuttle: Before I proceed, if the Court please, I would like to amplify a response made by counsel in the matter of dates. It is the fact that the two orders referred to, the order of designation, and the accompanying order, are dated August 25th, but your Honor will observe from the large printed book, they too, were filed on August 26th.

The Court: Yes. I have the originals.

Mr. Hobbs: May I interrupt Mr. Tuttle a moment. Do I understand your Honor wants to hear all of those in favor of taking the jurisdiction of this court——

The Court: I shall deal with these things quantitatively.

Mr. Hobbs: I would rather wait until I hear anything to be said by the other side.

The Court: If there is anything to be said in reply, I will give you a chance.

Mr. Tuttle: We have a number of points which we desire to present for your Honor's consideration, which we think go to the heart of the matter, and I will present as the first one the proposition that Judge Manton had ample power, ample jurisdiction, to designate himself as provided in the order of designation, and that in consequence the reasons, or, indeed, if we take the other side's phraseology, the propriety of his so doing is not open for consideration here, but would be a subject which might be considered by appropriate action in that matter, and may be an appeal.

The Court: You mean that if he recites that there is a public interest involved that it would not be for me to go behind that recital?

Mr. Tuttle: That is it. The statute—and it can be very briefly stated, because I know your Honor perceives it—the statute gives to Judge Manton as Senior Circuit Judge the jurisdiction and the power to decide, judicially, the question of the public interest. He decides that, and in so doing he acts judicially. The question as to what his reasons were; the question as to the sufficiency of those reasons, may possibly be a subject for consideration, although I should doubt that, by an appellate tribunal. Certainly it is not the subject of proper consideration by a Judge sitting in a coordinate, if I may use that phrase here, a coordinate office, because, of course, Judge Manton, designating himself as a sitting Judge of the District Court, becomes coordinate with the other Judges sitting there.

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Now we can illustrate that by calling attention to the fact that the statute provides that the Chief Justice of the United States may act similarly, and I think that that reduces the argument on the other side almost to *reductio ad absurdum;* that to suggest that if the Chief Justice of the United States, for reasons satisfactory to himself, believed that the public interest required him to designate Judge Manton or any other Judge of the Circuit Court to sit in the District Court, that the propriety of his action could be inquired into by a District Judge. In other words, the proposition comes down to this: that Judge Manton, in his capacity as Senior District Judge, is, by express provision of the statute, given both ample jurisdiction and ample power, and it is for him to decide, and his decision is a judicial one, and consequently cannot be open to collateral attack elsewhere.

The Court: How can it be a judicial decision if it is arrived at outside of argument and without any proceeding of any kind? I should say that it was the exercise of administrative discretion which, quite possibly, would not be disturbed. I would not call it a judicial act. I think what we are dealing with here is administration rather than judicial acts.

Mr. Tuttle: By the term "judicial" I meant in his capacity as Senior District Judge——

The Court: Oh, yes.

Mr. Tuttle:(Continuing)—in the exercise of the judicial powers which accompany that office, and which he possesses. Now, furthermore, it is to be observed in this connection that this is no isolated instance of action on the part of the United States Circuit Court of Appeals Judge at all; not only in this Circuit, but in practically all the other Circuits of the United States has similar action been taken from time to time by the Senior Circuit Judge, and, indeed, in many of them, as I will point out in a moment, the Senior Circuit Judge has desig-

nated himself, not for all purposes, but for the purposes of hearing a particular controversy or litigation or subject matter. In other words, I am pressing the thought that under authority of this statute there is ample precedent of the highest kind for precisely the action which Judge Manton took in order number one.

The Court: You tell me that that is so, and I accept it on the face of what you say, but do you mean there are reported cases on it?

Mr. Tuttle: I do not wish your Honor to take it on my say-so, but I am going to give you the precedents right away.

In the first place, we have in printed form the affidavit of Mr. Nicholls, and if your Honor will be good enough to turn to page 21—not in the brief, but in the printed affidavit of J. Osgood Nicholls, page 21 of that—you will observe on page 21 an order which was made on January 17, 1913, by Judge Lacombe as the Senior Circuit Judge, an order made in a particular action, so entitled, the venue being in the United States District Court even, and the recital being that in his judgment public interest requires that all motions and other proceedings in that action be determined before himself sitting as a Judge of the United States Circuit Court of Appeals, Second Circuit, in which said District lies, and "I do hereby designate and appoint Honorable E. Henry Lacombe, a Judge of the United States Circuit Court of Appeals for the Second Circuit, to hold the United States District Court for the Southern District of New York for the purposes of hearing and determining all motions to be made and the final hearing to be had, and all other court proceedings in said suit."

If your Honor will be good enough to turn the page, you will find a similar order in what obviously is a counterpart suit, made by Judge Lacombe on the same day.

The Court: I was just looking at that.

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Mr. Tuttle: Now if your Honor will be good enough to turn to page 27, you will find an order made by Judge Waddill, as Senior Circuit Judge of the Courth Circuit, designating himself to sit in the District Court for the purpose of hearing and determining a particular matter therein specified, to-wit, a matter of the removal proceedings against Manville H. Sprague.

We have collected, both in the affidavit and in the annexed papers, other instances. These show in themselves that according to the practice of this Circuit, and according to the practice of other Circuits, this order has
591 plenty of precedent.

The Court: That is the designation order?

Mr. Tuttle: Yes, sir. I am talking of the designation order. It is stated in the affidavit that in the Fourth Circuit, the Senior Circuit Judges in the same period of time have appointed themselves sixteen times to hold a District Court, and in three of said instances the designating orders have designated the Senior District Judge to conduct proceedings in specifically named suits.

In addition to that, as our affidavit shows, taken from the records in this Circuit, there have been designations made by every Senior Circuit Judge since Lacombe's
592 time, of himself to sit in the District Court; Judge Rogers, Judge Ward and Judge Manton, and Judge Hughes, and, in addition, if your Honor will look at page 26, of the same printed book, your Honor will observe a general designation as late as March 20, 1930, by Judge Manton of himself to sit practically for all purposes, and, of course, that order has been in force and effect at all times since, and was in force and effect on August 25th and August 26th, 1932.

Now a notable instance of such designation, as a precedent in this case, a notable instance of designation in this very Circuit, is that of Judge Lacombe designat-

ing himself in the Metropolitan Street Railway receivership.

That phrase, "if the public interest requires", our friends on the other side say they are entitled to have some other Judge investigate into that question. I think we have given reasons why, in sound law, it can not be done, but I believe we have a precise authority on that point which is set forth at page 25 of my brief, and is a decision by the Circuit Court of Appeals for the Fourth Circuit, in which there is express reference in the course of the opinion to the fact and to the law that it is the judgment of the Senior Circuit Judge that must control 25
under the circumstances.

The Court: That is exactly what I say. I should think that the designation order might very well be regarded as an exercise of administrative discretion that was given to him by the statute, that we might not be able to override.

Mr. Tuttle: It is on page 23 of my brief. Now in this connection it is important to have in mind that it has been decided by the Supreme Court of the United States that the Circuit Judge so designated does not thereby become a District Judge, as such, but he becomes a Circuit Judge and remains a Circuit Judge sitting in 259
the District Court.

I will call to your Honor's attention, as you have the brief open at that spot, to page 22 of it; the decision of the Supreme Court of the United States in Craig *v.* Hecht, 263 U. S., 255, where Senior Circuit Judge Ward designated Judge Manton to hold a District Court of the United States for the Southern District of New York, and you will see set forth there the terms of the designation. The Supreme Court did not question the sufficiency of the designation, but in referring to the capacity or character in which Judge Manton, a Circuit Judge, sat, there was the statement that "We agree with the

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court below that he was exercising the powers of the District Court. He was not a District Judge, but Circuit Judge assigned" in the words of the statute "to hold a session of the District Court."

Now that consideration may, and I think will, be important in the further development of my argument.

Before I leave that point, it says that when any of the conditions mentioned in Sections 13, 14 and 20 or any other conditions arise, "which in his judgment so involve the public interest as to require the designation of another Judge to hold any District Court." Your
2597 Honor has in mind that the Judge is acting, in the sense in which I use the term, in a judicial capacity. That is, exercising a judicial power conferred upon him by statute as Senior Circuit Judge.

Before we leave this particular point I also want to emphasize the fact that both sides do agree, at least, on this, that because of the peculiar character of the interests involved, the extent of the vital public concern, the interest possibly of the municipality it all indicates that a public interest was involved and that a receivership was vitally necessary. I will take to illustrate that the papers which have been served by the other side. This is their
2598 own petition.

The Court: That was a public interest, but that cannot go to the recital of public interest in the designation order. Are you going any further than that or do you say that is the end of it as far as I am concerned?

Mr. Tuttle: I say that is the end of it, but I am reinforcing, in view of the fact that they apparently now, if I understood—perhaps I misunderstood their argument—have challenged Judge Manton's power to find facts which would justify him in giving a certificate of a public interest, and I am simply——

Mr. Franklin: May I say he is not reading from the Johnson petition. This is a petition filed by Mr. Boehm.

Mr. Tuttle: I am reading from the Johnson petition, too, if counsel will give me a chance.

The Court: Wait a moment. He saw a yellow sheet there and he came to the conclusion——

Mr. Tuttle: It is yellow. I read from paragraph 19, from the petition of the intervenor, Benjamin Johnson, in the Johnson suit, and it says that the intervenor is imperatively required to ask for the time being a receiver to take charge of and continue the operation of these railroad systems for the accommodation of the public; to collect and receive and properly appropriate the income thereof until the final decree of the court, and in the petition of Johnson himself we find, in paragraph 8 the statement that the public interest is seriously involved in most, if not all of the issues raised. So we have this basic thought on which all parties agree; that a receivership was necessary; that insolvency was imminent, and that the protection of not only the rights of innumerable creditors to the extent of hundreds of millions of dollars, were involved, but that the interest of the public itself was vitally concerned, and it may be—of course I can not speak for Judge Manton—but it may be that Judge Manton felt that in view of the unprecedented size, the vast extent of the manifold interests and the interests of the municipality and the public itself, that it was appropriate that the Senior Circuit Judge, Chief Judge of this Circuit, should assume the responsibility of exercising the direction of that receivership. I say it may be that that was the consideration in his mind.

Now I pass to my second proposition, which is somewhat involved in the argument that I have already presented to you; that Judge Manton had proper jurisdiction over the Brake Shoe case by virtue of his designation. I have given you the precedents from this Circuit and the precedents from other Circuits, of specific designations for the purpose of hearing particular, and spe-

cific, suits, and I also say, in further development of that thought, that the statute plainly embraces such a designation. It cannot be said, by anything in its terms, to be limited solely to a general designation. The greater includes the less. There is absolute and complete power given here to make a designation for all purposes, and that means for any purpose.

The Court: Well, after he had descended from the upper court and made himself a District Judge for the time being, do you contend that he was as such District Judge, independent of the rules of the District, and could do anything that he wanted to, irrespective of whether they consent, without talking to them, or without doing anything about it? Does he go as far as that? It is a question of law that I am talking about. And after he denudes himself from the Senior Circuit Judge position and becomes a District Judge, is he in any better position than the rest of the other eight of us to do anything contrary to our own rules?

Mr. Tuttle: In the first place, your Honor has asked me several questions, I think, in one, but taking them in order, our contention as to his capacity is that he sat precisely as is described by the Supreme Court of the United States in the Craig case. He sits as a Circuit Judge holding a District Court.

The Court: Does a person who is a Circuit Judge holding a District Court have any different position than any other District Judge holding a similar position except that he has had more experience and has a bigger salary?

Mr. Tuttle: It may well be, and for reasons which I was going to advance in my third point. I have stated that he had complete power to designate himself, statutory power, which cannot be inquired into in a collateral proceeding. That is the first point. I am saying as my second point that he had proper jurisdiction over the

Brake Shoe case, and now I come, as the third point, to the consideration of the second order made by him and its bearing upon the applications of what have been described as Rules 1-A and 11-A.

In the first place I will present to your Honor the thought that if there had been no other order than the first order; if the first order alone stood, together with the designation of himself on March 30, 1930, to which I have called your Honor's attention; if the first order stood alone without the second, the proceedings which Judge Manton has taken would have been equally valid, irrespective of whether the second order was entered or not. 260

Your Honor has already read the second order, and of course it is not necessary for me to repeat that, but turning to these rules——

The Court: Well, but I think myself, with the result of this argument as it has developed itself in my mind, that the second order is the one to which most attention should be given, because we had a regular agreement, as we always do, as to division of business, and unless it is contemplated that a Senior Circuit Judge can come down and create disturbances and differences and disagreements, instead of sitting to straighten them out, I do not see why our rules dividing our business under the statute, would not control him, so that after he had gotten down there he would have had to go under the minimum requirement, to Judge Knox and request of him, in his capacity as Senior District Judge, to be assigned to this place, to sit in the motion part of the court. I should think that might be the minimum requirement. I am talking about orderly proceeding and rights. The question of power is a different thing. It is only the right to exercise a power that can validate these orders, and if the power was not rightly exercised, and it was an abuse of power, the orders, of course, would not stand, 260

and that is the thing, as I hear this question discussed for the first time, that gets into my mind all the time. How can a man go down, with the most beneficent intentions imaginable and create a disagreement which has not heretofore existed, and the disagreement has to be among the District Judges. It is not the District Judges and the Circuit Judge, because you have to play the limit. You cannot take just one case and dislocate the arrangement the District Judges have made by agreement among themselves.

Mr. Tuttle: I was about to say——

The Court: I am about to stop. I want you to talk to that point.

Mr. Tuttle: I do not wish your Honor to misunderstand me. We believe that this second order was entirely within the Judge's power and that it was entirely proper. I am saying, however——

The Court: You mean that the second order was a proper exercise of power?

Mr. Tuttle: Yes. I am saying, however, that I do not feel that the second order is necessary to sustain the action which has been taken here. I simply say that it adds a second bulwark to that action, and, following your Honor's thoughts——

The Court: I think that the second order looks as if it was an obvious effort to escape from the otherwise inescapable situation of being in the District Court as a District Judge and having been faced with those rules 1-A and 11-A, and then having come down there and finding those rules, they were hurdles which would necessitate his, under Rule 1-A, conferring with Judge Knox, and in that way getting into the motion part, and if he contended that the only person to whom the application could properly be made would be to the motion Judge—I mean how do you get away from it? After all, they are the rules, and there they stand. They are valid rules,

and I do not see how anybody can come down and just brush them aside. We are talking about the orderly administration of justice. That is the thesis I am offering you to maintain. I want to hear how you can brush these things aside. What is the use of these rules if anybody can come in and override them?

Mr. Tuttle: It is not a matter of brushing them aside. That is not the thought we have in mind. I would like to develop two theses before your Honor.

The Court: Yes. I want to give you all the time you need.

Mr. Tuttle: I am very glad your Honor gives me the 26
thought that you have in mind, because I can press my argument more intelligently, knowing that.

In the first place, just to state our position first, and then develop the argument afterwards, I am saying that I do not regard the second order as essential to sustaining what has been done. I am saying, however, that we support the second order and believe it an additional bulwark in support of what has been done, and then your Honor, in your observations here, made a statement which, if I got rightly, I venture not to agree with, and probably I ought to state that now, and that is that you stated that if there was power, but there had been an 261
abuse of power——

The Court: Yes.

Mr. Tuttle: ——the order should be vacated.

The Court: Yes.

Mr. Tuttle: Now that might be true in the action in which the order was made, or it might be true of a doubtful exercise of power, but we very respectfully challenge the power of another Judge in another action, simply because he assumes or comes to the conclusion, that a power which exists has been abused, to vacate that order. And I will address myself later on to precedents and authorities to that consideration.

The Court: Of course the nexus between this proceeding and the other proceeding is that each of them has the same defendant, and that defendant in which these plaintiffs in these cases own securities, is in the hands of persons who, whether rightly or wrongly, the plaintiffs say, they do not want to leave them with, and I believe, so far as the *locus standi*, as far as these orders are concerned, you would be dealing with a technicality. That is the way I look at it.

Mr. Tuttle: I hope your Honor will not reach that conclusion at the present time.

The Court: I am saying I am only throwing that out to you to shoot at. You see, in the last few days since we arranged to have this argument, I have naturally been thinking about this case, insofar as I knew anything about it at all, and about the rules and about the orders and I have wondered very much indeed on all those points you mentioned, and I want to be corrected if I am wrong in saying that when A and B have agreed that B should go into a receivership, and then C, D and E who own securities in that same defendant B, also dislike for whatever reason, the people who have been appointed receivers of B, why are not they entitled in this case to challenge them, because under the equity rules they could not intervene in the equity case without subordinating themselves to that proceeding. Whatever other remedy have they got, if there is a remedy? There is the property of which they are aliquot owners and it is jeopardized, they believe, by what has been done. After all there is the Manhattan Railway, and the Interborough, both of them defendants, both of them in the hands of receivers. Why on earth can not these people come in with this independent suit and challenge the existence of that receivership on the ground that it was not based on a proper exercise of a judicial act?

Mr. Tuttle: I want your Honor to understand in the first instance that historically at least, it is not a correct assumption that they did not have power to intervene in the proceeding before Judge Manton, because these very counsel, on behalf of clients whom they represent in this very action, did intervene before Judge Manton; were permitted to do so, and that they made application for the appointment of other receivers in that very proceeding, and that that was denied. It was not until it was denied, and had been denied for some time, that they brought forward this proceeding seeking, and I say it with all due respect, to put your Honor in the position of 26
reviewing an exercise of power by Judge Manton. And our proposition is, and we do maintain this most strongly, that it is not before your Honor to determine whether or not Judge Manton properly exercised the power. The utmost that would be before your Honor would be to determine whether or not he had the power.

The Court: I did not say they had the power to intervene. I said if they did intervene they had to subordinate themselves to that proceeding, and, therefore, could not challenge the proceeding——

Mr. Boehm: I would like to correct the statement made by counsel.

The Court: I do not care about that. I have been 261
interrupting you too much, probably, Mr. Tuttle, but I think a matter like this is more of a conversation than a set speech for fireworks. It is better.

Mr. Tuttle: Judge, I left all my fireworks behind.

The Court: I know you have. Proceed.

Mr. Tuttle: Now, addressing myself to that thought, which is obviously fundamental in your Honor's mind, I want to go back in the first instance to these rules themselves. There are two classes of rules, and I think your Honor has already pointed that out.

The Court: I?

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Mr. Tuttle: Yes, sir, because you, in answer to something that was suggested by the opposing counsel stated that certain rules were equity rules.

The Court: The equity rules, yes.

Mr. Tuttle: Would have to be passed upon and approved by the Circuit Court of Appeals, before they were in force and effect.

The Court: The other rules did not have to.

Mr. Tuttle: I will call to your Honor's attention, while we are right on that, the language which makes that so, so that we can see what is the content of rules
621 which, to be effective, have to be passed upon by the Circuit Court of Appeals. Now I have the statute, and that rule of the Supreme Court set out——

The Court: It is not in the Judicial Code, is it?

Mr. Tuttle: I have it right in my brief, if your Honor will look at my brief. If your Honor will open the brief at page 28, you will find that I have collected there the statute and the Supreme Court rule which is for your Honor's consideration:

"The District Courts may, from time to time"—and then I ask you to note this—"and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under Section
622 730 of this Title, make rules and orders directing the return of writs and processes", etc., and practically covering the entire matter of practice and government by rule.

There are two conditions. One is that they shall not in any manner be inconsistent with the laws of the United States; second, or with any rule prescribed by the Supreme Court under Section 730 of this Title. Of course those exceptions would be implied even if they were not there. The Supreme Court of the United States has held over and over again that the rule-making power is not a power to abrogate or change statutes, or abrogate or change rules prescribed by the highest court under competent jurisdiction.

The Court: Do you seriously contend that that is an equity rule within the meaning of 11-A?

Mr. Tuttle: No, that is just the initial statute. I am now calling your Honor's attention to Section 731. Now you will notice that the content and scope of that statute covers not only the filing of pleadings, the taking of rules, the entry and making of judgments by default, and other matters in vacation, but otherwise regulating their own practice as may be necessary and convenient for the advancement of justice. Their own practice.

Now Section 730, which immediately follows that on the same page prescribed that, "the Supreme Court shall 26
have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering and enrolling decrees, and of proceeding before trustees appointed by the court and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the District Courts."

The Court: That is quite true. I just have had to deal with this whole question of equity rules in a case 262
I decided last July, and I am quite familiar with that, but what I want to get at is, how do you make out 11-A if that under the practice is an equity rule?

Mr. Tuttle: I am just putting down the planks in my platform. I have two in my platform now.

The Court: I see. Come on across.

Mr. Tuttle: The third is the rule adopted by the Supreme Court of the United States pursuant to Section 730, and is equity rule 79, which says that "With the concurrence of a majority of the Circuit Judges for the Circuit, the District Courts may make any other and further rules and regulations for the practice, proceed-

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ings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same."

I cannot conceive that in giving that rule-making power in an equity case the language could be broader than that.

The Court: Well, I can.

Mr. Tuttle: It covers anything from the practice——

The Court: Practice does not mean going around and getting an application for a receiver. It means the proc-
2627 esses and things of that kind, that are issued to get jurisdiction over people, and I should think that, for instance, if I was sent up to sit in the Customs Court and try an equity case, as I was this last Spring, and I sat there for some weeks, I should suppose under your construction that the Circuit Court of Appeals would have to permit me to go up there in order for me to have valid authority. This is a calendar rule. It is a general rule. It is not an equity rule.

Mr. Tuttle: If the Court please, I am contending this: first, that this Rule 11-A is in effect a rule which falls within the very subject matter of Section 730, and then I am making the further contention that even if it does
2628 not, even if your Honor wishes to call it a mere practice rule and outside of the scope of the word "practice", in Rule 79——

The Court: No. I did not say "practice". I said calendar rule.

Mr. Tuttle: I am saying that even if, for purposes of practice on the calendar, or calendar practice, you wish to consider it as not falling within the word "practice" in Rule 79, the same result follows, and I would like to develop these two——

The Court: Let me ask another question. If that is an equity rule, is our rule for pooling on calendars

and having a Judge sit in equity and a Judge sit in crime and a Judge sit in jury cases, is that an equity rule, too?

Mr. Tuttle: If it is an equity case.

The Court: If it is an equity case it is an equity rule?

Mr. Tuttle: Yes.

The Court: If it is an admiralty case it is an admiralty rule?

Mr. Tuttle: Yes.

The Court: I do not think that is right. I would not be so positive about that if I had not spent two weeks this Summer on this very sort of subject. I would not say so. No. I am not ruling with you on that. I do not say it is final, but——

Mr. Tuttle: I am trying to present to your Honor this thought: that whether it is an equity rule or not, that is the contention I am advancing; whether it is an equity rule or not, the position we have here is a sound one. We claim that it is an equity rule because it deals with an equitable case, and an equitable subject matter, and falls precisely within the language of equity rule 79 for which there is competent authority, and Section 730.

Let us take it the other way. Assuming it is not an equity rule and is not within Section 79 or Section 730. Let us call it simply a calendar rule for the governing of the calendar, and then we will come to what I have been trying to bring forward as my third proposition here: whatever authority then, there would be for such a rule would have to be found, of course, in Section 27, Title 28. It has already been referred to by counsel, and it is set forth on page 24 of our brief.

Now then we have this situation: we have a statute which in so many terms permits a Senior Circuit Judge to designate himself, or any other Circuit Judge, to sit and hold a District Court for all purposes, or for any special purpose which he may designate, and that statute

says that during the period of service of any Judge designated or assigned under this Chapter, he shall have all the powers and rights and perform all the duties of a Judge of the District Court. He therefore has before him, so designated, the question of whether or not he will agree to the rules which have been adopted by other District Judges. In addition, with this further consideration, that he himself has, by an order dated in March, 1930, designated himself to hold a District Court for all purposes. His name has never been signed to those rules. He took no part in adopting them.

533 The Court: It does not make any difference. He had no right to take any part in adopting them. He is just a *pro haec vice* Judge. You do not mean to say if all the Court of Appeals Judges were assigned to the District, that they would do it. Judge Mack did not take any part in it and he is not assigned to the District Court.

Mr. Tuttle: Here we have a statute, Judge, which gives a Judge so designated all the power and all the rights of a District Judge. See what it would lead to my adopting rules——

The Court: Excuse me a minute. What would it lead to, then; you would say that all of our rules not having been adopted with Judge Manton's consent are 534 subject to his approval and because he did not approve of them he could disregard them?

Mr. Tuttle: On the other hand, and with equal force, it could be suggested that so far as equity causes are concerned, indeed other causes too, it would be possible by a rule to entirely prevent a Senior Circuit Judge, designating a Circuit Judge, or one of his associates, so as to have any effective jurisdiction in the District at all, and thereby, in effect, repealing and abrogating that statute. If it could be done in this limited sphere, it could be done in the broader sphere, and, consequently the Circuit Judge would have no power. He would be entirely

dependent on Judges of a lower court as to what jurisdiction he might have, and what matters he may hear, whereas this statute confers a power upon him, as a Senior Circuit Judge, not dependent in any way upon the will or limitations which the Judges of the lower court may seek to impose. It would be in effect, and I say it with all due respect, not so much a stepping down by Judge Manton into the District Court, as a stepping up by the Judges of the District Court into the Circuit Court of Appeals, and saying to the Senior Judge there, "You shall exercise your statutory powers only in the way which we will prescribe by a rule."

Now, if the Court please, you will notice, if you examine closely, this section 27 that it says "In Districts having more than one district Judge." That is, the Judges of the District Court.

The Court: Certainly.

Mr. Tuttle: (Reading) "Upon the division of business and assignment of cases for trial in said District; but in case they do not so agree the Senior Circuit Judge of the Circuit in which the District lies, shall make all necessary orders for the division of business."

The Court: All right. That is perfectly clear, and that means that if the District Judges cannot live together and cannot arrange things among themselves then they can ask the Circuit Judge to straighten it out. Is not that what it means? That is what happened in the case of Case against United States.

Mr. Tuttle: That is all the statute says, and therefore I come back to the propositions which I advanced in the first instance, that these rules, Rule 1-a and Rule 11-a, have no application at all, and are no limitation upon the exercise, by the Senior Circuit Judge, of the broad power given to him. They apply only to the actions of the District Judges among themselves, and not to any determination that he may make that the public interest requires

a specific subject matter to be heard and determined in a given way.

The Court: Well, what is the orderly process then, I ask you again, when he comes down and appoints himself a District Judge, and finds himself in the District Court, and perhaps for the first time sees the rules of the District Court, what is the orderly procedure to follow? To change like Proteus into another form and become Senior Circuit Judge again and declare that he has reported to himself that he disagrees with the other Judges, and therefore he is going to straighten out the disagreement?
2639 That is not orderly procedure surely. He certainly would not have to talk to Judge Knox about it and see what should be done?

Mr. Tuttle: May I, with all due respect submit, then, that to say that is not orderly procedure really begs the question.

The Court: You say so.

Mr. Tuttle: The real fundamental question is what power he has to determine what his procedure shall be.

The Court: You mean he could determine just what sort of procedure he wanted to follow irrespective of any District Court rule?

2640 Mr. Tuttle: That is what these other Senior Circuit Judges have already done who have specified a particular matter to come before them.

The Court: How do you know? Suppose there was no such rule then as now?

Mr. Tuttle: I have not the slightest doubt that at the time these orders were made with reference to specific subject matters there was a Judge sitting in this Circuit at a particular part which, in ordinary course, would have heard that application if it had been presented to him. I have no doubt at all that what might be determined orderly procedure, as governed by the common practice would, in each one of those cases have been to

take that matter before the Judge sitting at the proper District Court.

The Court: But there was not any such rule as 1-a and 11-a at that time, and there is now. That is the whole difference.

To my mind,—of course I may be wrong about it, but that is the way it strikes me,—there you have something that you have absolutely fixed, and that was the reason, the contemporaneous construction of the situation, that lead to the second order declaring a disagreement, because if it was not for the rules I do not see that we would have had the second order at all. The second 26 order referred to disagreement, and inasmuch as the agreement which is on file here and now before me between the Judges as to their allocation of business, by which each person has his own business given to him during the summer, and also during this coming court year, all signed and agreed to, that fitted into these rules. I must say I cannot follow your——

Mr. Tuttle: May I ask your Honor this: after the designation has been made by the Senior District Judge of himself, or one of his associates to sit as a District Court, is your Honor of the preliminary thought that he then and there is lacking of the powers which every other District Judge has? A. Namely, the power to assent or 264 dissent.

The Court: I am, yes. Absolutely.

Mr. Tuttle: Why, the statute which governs this thing gives to him all the powers.

The Court: Oh, yes. The District Judges agree among themselves, if they agree. Nobody else has any right to impinge on them at all. That is my view. I do not think there is anything to argue about on that question. It seems to me so. I may be quite wrong about it, you know.

Mr. Tuttle: The effect is what I have tried respectfully to point out: that it is in effect limiting an express

statutory power given to the Senior Judge of the District, with all the responsibilities of that office, to make a designation, not only for all purposes, but for specific purposes, and to hold a District Court as such. The statute gives him all the powers and all the rights, and yet the conclusion which your Honor would suggest, would mean he did not have all the powers, and did not have all the rights.

The Court: No. It simply says he can designate to sit as a District Judge. That does not say he can designate himself to be the District Court on the question of
2645 rules and all that. If he comes in as a District Judge he has to conform with our rules as lawfully made. That is what I think.

Mr. Tuttle: I think your Honor has not stated the full statute. The full statute says that during the period of service of any Judge designated and assigned under this chapter he shall have all the powers, and rights, and perform all the duties of a Judge of the District or a Justice of the Court. Now then these rules that have been referred to here are merely the record of an assent between certain District Judges. They would not be binding on any Judge who did not assent.

The Court: Oh, I do not agree. If the majority of
2646 them did I think they would be binding.

Mr. Tuttle: Oh, no, Judge. You cannot say that is the statute.

The Court: I cannot imagine being half slave and half free. You could not run a court that way.

Mr. Tuttle: But, if your Honor please, that is the very thing provided for in the statute; that one Judge may dissent, and then it is provided what shall happen.

The Court: Dissent where?

Mr. Tuttle: On the power to make these rules.

The Court: You are talking about Section 23?

Mr. Tuttle: Section 28 or Section 27 of the United States Code.

The Court: I have only the Judicial Code here.

Mr. Tuttle: It is on page 24 of my brief. That is the section I am talking about; the bottom of page 24 of my brief: "In Districts having more than one District Judge, the Judges may agree upon the division of business and assignment of cases for trial in said District; but in case they do not so agree——"

The Court: That is the division of business.

Mr. Tuttle: Judge, may I just make my statement?

The Court: Yes. Go on.

Mr. Tuttle: (continuing) "but in case they do not so agree, the Senior Circuit Judge of the Circuit in which the District lies, shall make all necessary orders." They do not say the power to decide is with the majority of the Judges of the court as you suggested, sir——

The Court: I was talking about rule making.

Mr. Tuttle: I am talking about rules 1-a and 11-a; whether we call them calendar rules or equity rules. I say if there was any authority for those rules it must be found in this section.

The Court: Oh, I do not think so.

Mr. Tuttle: Or else it is an equity rule, if it is not found in this.

The Court: It is in that other section; the power of the District Court to make rules.

Mr. Tuttle: Yes, but the District Court's power to make rules under this section is, by express limitation, confined to such limitations as the Supreme Court of the United States in equity rules may prescribe.

The Court: Oh, yes.

Mr. Tuttle: And they have prescribed, as regards equity rules that rules when made by the District Court will not be valid until passed upon by the Circuit Court of Appeals.

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The Court: I do not think that is an equity rule. I do not think that section has anything to do with it at all. If you read ex parte Briggs, and those cases where they wanted to try the causes without coming from Casnovia, and they could not agree on working it out, there was a division of business.

Mr. Tuttle: I have already stated that I am willing to take either horn of the dilemma. We contend this is an equity rule because it governs the question of who is to try equity cases, and that is by every terminology an equity rule, but if we say that these rules relate only to
651 the matter of calendar practice, and therefore for some reason which I do not see, are not within Section 79 of the Rules of the Supreme Court of the United States dealing with equity cases, then we are driven back to this section 27 and I do think, and respectfully submit, that your Honor was entirely in error in suggesting that where one Judge disagreed he would be bound by the decision of the majority, because in this particular subject matter under that section, there is another body or power set up to determine what shall happen when there is disagreement, and, therefore there is no power in the eight Judges of the District to prescribe a rule of this kind and make it binding on all the Judges if one or more
652 of them, less than a majority, dissent.

The Court: Well, I do not agree. Flat on that. We will leave that. How much longer have you for your particular argument?

Mr. Tuttle: Of course my associates and Mr. Guthrie wish to speak.

The Court: I am not crowding you at all. It is quarter past one now. Would you like to take a little longer now?

Mr. Tuttle: I would just as soon or prefer to eat at this time, if that thought was in your Honor's mind.

The Court: All right. We are agreed on one point, then. We will adjourn until two-thirty.

(Recess until 2:30 p. m.)

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AFTERNOON SESSION.

The Court: Mr. Tuttle, I have been working during the lunch hour and I have just read this case of Galveston Dry Dock & Construction Company in 40 Federal 2nd, and that was a case in which Judge Manton, Judge Hand and Judge Chase sat in the Second Circuit Court of Appeals, and Judge Hand wrote the opinion and he said the rule had the force of law and that the Circuit Court of Appeals were as much bound by it and as much bound to observe it as though it were a statute. 26

Mr. Tuttle: There is no question in our minds, Judge, that a rule competently passed under authority of statute has just the effect of a statute.

The Court: Then take your 1-A and 11-A; your attack on them is that they were not passed according to the statute, is that right?

Mr. Tuttle: Yes, and also the question of their application to a Circuit Judge of the Court of Appeals sitting under authority of another statute. 265

Let me just before I pass the ball to my associates, your Honor, lay before you some additional facts.

In the first place, to illustrate what seemed to me a *reductio ad absurdum* in the opposing position, I cite you Rule 1-A itself, which says that any judge designated to sit in the District Court for the Southern District of New York shall do such work only as may be assigned to him by the senior District Judge. That language of that rule is such as to suggest that it possibly anticipated a desig-

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nation by the senior circuit judge of some Circuit Court judge to sit in the District Court.

The Court: Or a District Judge or any judge.

Mr. Tuttle: But it says any judge designated to sit in the District Court. Your Honor is not a judge designated to sit in the District Court. Your Honor is a judge of the District Court. And I say the language of that rule is so framed as to suggest, at least to the outsider, that it was intended to apply to a Circuit Court Judge designated to sit in the District Court.

The Court: Yes, or any other judge.

2657 Mr. Tuttle: Yes, but if there had been only in mind the District Judges, then I should think it would have simply have said that the District Judges should do such work.

The Court: We are not talking about the same thing. Supposing he had designated Judge Howe to come to sit in our court from Vermont. He was designated to sit here to help out. That means Judge Knox could determine how he would be most helpful; whether he should sit in Crime, the Civil Jury part, or what court.

Mr. Tuttle: I am pointing to the language of the rule which is comprehensive, which, I submit, is *reductio ad*
2658 *absurdum* in the opposing position, and that is this, that under that rule as it literally stands, if Circuit Judge Manton should designate himself, or any other Circuit Judge, it would be for Judge Knox to say whether he should transact any business or not; taking the wording as it stands it would be in the power of the Senior District Judge to entirely nullify the provisions of the statute which expressly confers upon the Senior District Judge the power to determine whether public necessity exists and to act accordingly.

And, secondly, I see I can put the same thought in another way, suppose in the opinion of the Senior Circuit Judge it would be important in the public interest

to designate three or four of the circuit judges, because of supposed pressure of business or otherwise, to sit as District Judges. It would be in the power, then, of the District Judges to adopt at that time a rule of this character simply because they are a majority and to say to the four Circuit Judges who are so assigned, "You are a minority. We will transact the business." I am not imputing any such thought to our judges here, but——

The Court: I understand. We have to play limits in matters like this to see what is there of importance.

Mr. Tuttle: Absolutely. I am only illustrating, and I am trying to bring home to your Honor the thought 266 that it cannot be contemplated, according to the power as it exists to delegate to any of the district judges the power to adopt a rule or method such as this to entirely nullify or to make it possible to nullify the express superior power, the supreme power, given to the Senior Circuit Judge in this District, to decide these questions in his own view of what the public necessity requires. So much for that.

The Court: I want everybody to understand that these questions are all being dealt with more, so to express it, in rem, and not in personam. We are dealing with the question of what the result of this would be, 2661 and not whether one person would go and do something or not go and do something. You understand that, don't you?

Mr. Tuttle: Yes. That is why I said I was not imputing such actions, if certain interpretations of the law took effect, and I say it is inconceivable that such results were intended, or could be possible; that the view that supports that must be erroneous fundamentally.

The Court: I am not so certain that I agree with you on that and it seems to me that the Senior District Judge ought to be able to arrange the business and if the other man has a right to designate someone to go there, after

he gets there why doesn't he come under the rule that the Senior District Judge says he should? You see you cannot be both a Circuit Judge and a District Judge at the same time. You have to be one or the other.

Mr. Tuttle: If your Honor's thought is so, then the Senior District Judge could say in effect, we do not want anybody to come down from the Circuit Court of Appeals to sit in our body. You go upstairs where you came from. And does not that illustrate at once the proposition that is overriding the express statutory power given to the Senior Circuit Judge?

2663 The Court: Yes, but this rule does not say he shall not do anything; it says he shall do such work as shall be assigned to him.

Mr. Tuttle: Such work only as may be assigned to him. That is my point. Now, it is under that rule, if the rule is valid to the extent that it has been suggested here that then, of course, nothing need be assigned to him, and in effect the access of the Circuit Judge to the District Court under the authority of that statute may be shut off. I am not quite clear whether I gathered from your Honor's remark—to take up another angle of this matter—whether I gathered from your Honor's remark this morning that you thought these so-called Rules 1-A

2664 and 11-A were passed under authority of Section 27 relative to the division of business?

The Court: Oh, not at all. You see the trouble is with us that I have the book which only gives the numbers of the sections of the Judicial Code and you are talking about the United States Code annotated.

Mr. Tuttle: Yes, sir. Section 27 of Title 28.

Mr. Pettigrue: It is Section 23, I think.

The Court: That is Section 23 of the Judicial Code and I have been thinking of that and talking of that. If I talked correctly on that basis I do not think that that has anything to do with rule making whatever.

Mr. Tuttle: Then, as I understand your Honor's position, so that we may all address ourselves to it, your Honor's position is that this is not a matter connected with a mere agreement to divide business as authorized by that section but, on the other hand, is under Section 731.

The Court: I think perhaps I can clarify it for you this way: My conception of the thing is,—I have been thinking it over—this way: that we have certain rules that we have adopted, and so far as I can see, entirely validly adopted; among them 1-A and 11-A. What we do in the division of business in the pursuance of these 26( rules is a matter of agreement between the judges. For instance one judge might say, "I would like to go to Europe in May but I have some assignments arranged later in the summer, so I would not have to sit during June" or something of that kind. That is what you would do under the set-up of the rules. The rules form the pattern of the thing, but then you go along and make your arrangement as to the division of business in the light of those rules and when you do divide the business, and when you do say that Judge Patterson is going to sit in the motion part in August, as was the case in this instance, why then you have him as the only judge who is competent to entertain receivership applications. 266'

Mr. Tuttle: Well, then, I understand your Honor's position to be that Rules 1-A and 11-A are not to be supported under that particular section.

The Court: Under division of business, I do not think that has anything to do with rule making under the law.

Mr. Tuttle: Then I assume your Honor's position is that the authority for them, as rules, would fall under Sections 731 and 730 of the statute dealing with rules of practice in District Courts and the regulation of practice in District Courts by the Supreme Court. Otherwise——

The Court: Yes, absolutely, and you see that in that way there are certain kinds of rules, equity rules, that you have to have, under the statutory enactment, Rule 79 of the Supreme Court, any equity rule submitted to the Circuit Court of Appeals. As to the other rules we are absolutely free.

Mr. Tuttle: Then our feeling would be that these so-called rules are either equity rules dealing with equity subject-matter, or else they must, of necessity, be by agreement adopted by the judges for the division of business. I can conceive of no other classification——

The Court: No, they are simply rules. That is all. A general rule of the court; that they can divide the business. It means that three or four people say they have certain business to do, and one says, "I will take Crime" and the other says, "I will take Civil Jury" and the other says "I will take Motions" and the other says "I will take Admiralty." But the rule is that when one does take motions, all applications have to be made to him.

Mr. Tuttle: As we are just talking colloquially why does it not come down to this, that it deprives, in effect it limits seriously the power of the Senior Circuit Judge to decide when public necessity requires him to act.

The Court: I do not think so.

Mr. Tuttle: Why, he cannot deal, then, with any particular subject-matter and say that that case or that particular subject-matter through public interest should be considered by and handled by one of the Circuit Judges.

The Court: That is right, but the statute says he can designate when to go to the District Court. It does not say he can designate when to go to the District Court with the portfolio of the case under his arm.

Mr. Tuttle: But it says "Public necessity." And a rule of this character worded as this is, we respectfully

submit, transfers all that construction, or the major portion of it, to the Senior District Judge.

The Court: You cited a whole lot of cases where Senior District Judges have designated themselves to try a particular case. Well, in all those cases until this one, there had not been any such rule as this in the District Court. That is one difference. And the other thing is that I question very much whether if challenged, such a designation would be an appropriate one. There is no reason why one should not designate himself to sit in the district, but whether he should designate himself to go there with a case is another thing entirely. I 26
think it is merely saying that the District Court wants to be master in its own house. Why shouldn't it be? It may want help. It may want somebody designated to come down and help it, but after you get your designation, why should not they be able to say we will use the designatee in the way that is most useful and valuable to them. We are evidently at quite opposite ends of the pole on the subject.

Mr. Tuttle: It does seem to us, most respectfully, that your Honor's viewpoint is entirely nullifying the controlling power, the supreme controlling power given to the Senior Circuit Judge and is, in effect, transferring
that power to the Senior District Judge who may or may 267
not wish to assign to the Circuit Judge so designated, any of the activities or any of the duties which causes the Senior Circuit Judge to say that there was a public necessity.

I do not believe it changes, except from the point of view of degree, the situation, to suppose a case where the designation was made by the Supreme Court Justice of the United States. In degree it illustrates it but it would in effect give the Senior District Judge,—this rule,—the power to say, whatever reason led you to believe the public necessity required the designation of a Circuit

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Judge, that Circuit Judge is going to do only such business as is assigned to him, whether or not that business has any relation to the public necessity which causes his designation. That is the statement of the conflict as I see it.

Now, Judge, I do not want to trespass too much on your time.

The Court: No, I want to hear everything you want to say. I want to hear every facet of this thing.

Mr. Tuttle: Then I want to present one other consideration which is aside from what I have said. It has
2675 relation to a situation as to which I understood your Honor did not express any opinion, but put it up to me, as you said, to shoot at, and that is this, that under the statute there is the express, unrestricted power to designate a Circuit Judge to sit in the District Court. In other words, the office exists. The office is a lawful office. It is filled lawfully and I am saying that under those circumstances there cannot be a collateral attack such as is launched in this suit against the action of the judge filling that office, in the first place, because it is not possible legally to have an indirect attack of that kind, unless, indeed, you could show that the action of the judge was entirely without jurisdiction and entirely without
2676 power; and, in the second place, and a further reason to the same end, is that he at least would be under the authorities a de facto judge.

Let me illustrate with a couple of cases exactly what I mean, and then I will pass the subject to my associates who have been very patient.

The Court: You say a de facto judge?

Mr. Tuttle: I did not say Judge Manton is a de facto judge.

The Court: Oh, you mean acting as District Judge he would be a de facto judge or what do you mean by de-facto judge?

Mr. Tuttle: I say at least he would be a de facto judge. Let me illustrate exactly, because it is capable of presentation from the authorities. In the first place, take the first proposition I advanced. I am talking of 280 U. S.

The Court: Is it in your brief?

Mr. Tuttle: Yes, sir. It is page 16. The Grant case. It was contended there that the appointment of a Receiver in the Common Pleas Court of Ohio was improper for non-compliance with statutory requirements. In refusing to consider the contentions, the Court said by Mr. Justice Sanford what your Honor reads there:

"Even if the order appointing the Receiver was erroneous and might have been vacated in part in a direct attack, as upon an appeal by the Furnace Company, its validity was not challenged in any respect by the answer of Leach & Company in the District Court, which admitted the allegation that Grant had been 'duly appointed' Receiver of all the company's property. And plainly the validity of the appointment could not have been questioned by a collateral attack in another court."

The Court: Well, "collateral attack in another court?"

Mr. Tuttle: Yes, but the same rule applies as the cases show, to a collateral attack in another suit. This is, of course, not the Brake Shoe suit. This is another suit altogether.

The Court: Yes, but it is a suit against the party asking for the appointment of a Receiver against the very party bringing the suit in which the Receiver was appointed, in the Brake Shoe case, so that the *locus standi* of these gentlemen to be heard, as I have heard them today, is due to the fact that they are asking, as to the company in which they have stock, by way of owning securities, to have another Receiver appointed.

Mr. Tuttle: May I ask whether this would be a conceivable situation: Suppose your Honor takes such ac-

tion in this matter as you might determine to do. Suppose conceivably you vacate the order and appoint Receivers of your own. Suppose tomorrow some other stockholders in another suit, not before your Honor, start an action questioning your jurisdiction or the propriety of your exercise of it; suppose other stockholders, for example, should go into Judge Manton sitting in the District Court and he should say that your Honor was without jurisdiction or did not porperly exercise it? You spoke a little while ago of orderly procedure. See the chaos such a situation would result in, and that is the reason behind this rule that there may be a direct attack. Unless the order is absolutely void there may be a direct attack and that direct attack can only be in the suit itself. These people have that remedy.

The Court: How are they attacking it in the suit itself? If they intervened in the suit, they would be subject to the suit. They cannot be antagonistic to it.

Mr. Tuttle: They can intervene for the purpose of presenting to Judge Manton the question that he is without jurisdiction and should dismiss the bill.

Mr. Franklin: It cannot be done.

Mr. Tuttle: And if he refuses they can appeal. And there are any of those other remedies through writs which are familiar; mandamus and prohibition remedies. I maintain they can go into this suit, not for the purpose of adopting that suit, but for the purpose of challenging the jurisdiction. They do not have to intervene as plaintiffs; they can come into court and say, "We have an interest in this subject-matter. Your Honor is acting improperly here. You have no jurisdiction to affect our property in the way you are doing it, and we ask you to dismiss this bill and nullify all the proceedings." The judge will grant that or deny it. Interested parties who feel themselves aggrieved can appeal. There is no difficulty about that situation. Instead, for other reasons

altogether they undertake here to pit one court against another; one judge against another. And I am saying that this rule to which I have referred is a rule which is adopted of necessity, to prevent just that situation arising. It cannot be done collaterally in another action or in another court. The door is open in the action itself.

I will now go to the second reason why I said there could not be a collateral attack. That one which I referred to is under the de facto rule.

The Court: I do not see that other case; where you have any citations on that. I can quite understand that in another court it might not be possible, but in another case and in the same court, with the nexus between them of the same parties why is it——

Mr. Tuttle: If your Honor please, if it is not clear it is through some oversight, because I am aware of a multitude of these cases, having been through the same situation myself, and I can submit a number of cases to show it cannot be done collaterally in another suit.

The Court: Here is this Italian Star Line case.

Mr. Tuttle: Yes. Is that not such a case?

The Court: I did not think it was that kind of a case.

Mr. Tuttle: Both proceedings were in the same court, sir.

The Court: Yes, quite true, but it was not a challenge of jurisdiction. It was, as I seem to remember it, and hearing about it at the time, that the Italian Star Line sued the Shipping Board for malicious prosecution and sought to introduce the fact that a Receiver had been appointed here in some consent fashion, and as a basis for that malicious prosecution, and it was not a case where another party came in, the way they are doing here, and sued the same defendant and asked for other Receivers to be appointed in its stead.

Mr. Tuttle: The proposition is one, of course, which can be very completely demontsrated one way or the

other from authorities. If the authorities are not here I am going to ask leave to supplement them, because we have been through that proposition in recent litigation, and I know the principle not only applies to another court, but to another case where other parties are seeking to bring about an overthrow of what has already happened in the particular action. It must be so, because otherwise we would have this chaos to which I have alluded; this lack of procedure forced upon us.

The Court: Yes, but I always feel that no one more thoroughly believes in orderly procedure like that than I. I mean I feel that I am a stickler for it, but the question here is whether this original procedure was orderly and was appropriate and was proper, and whether it was not an abuse of power, and if an abuse of power or abuse of discretion, I suppose you can set aside an order, can't you?

Mr. Tuttle: That is the point, judge, which I tried to present before.

The Court: Mind you, I am not talking about setting aside the Receiver order, because that is something that would follow naturally. I do not pay any attention to the prayer to set that aside, because if this jurisdictional basis of it, whatever you want to call it,—power basis,— is all right, you would not have anything to do with the Receivership orders, and if it is not all right, the Receivership orders would fall of themselves.

Mr. Tuttle: Your Honor used the expression "abuse of power" and "abuse of discretion" as the basis for setting aside an order——

The Court: Oh, no, I said you can have an abuse of power as well as an abuse of discretion and I say if this was an abuse of power, why would not that be ground for setting aside the order as to disagreement?

Mr. Tuttle: Our proposition is, and we advance it with all respect and the fullest confidence, because I do

not think an authority can be cited to the contrary, that where there is merely an abuse of power, and not lack of power, no coordinate judge can set aside the order that has been made. The only remedy is to apply to the judge who made it, and made the record which demonstrates the fact, or else take an appeal.

Now that is fundamental in this case, because we are saying here that we are demonstrating that there is no lack of power in these orders that have been made. The power exists. Now your Honor says it was unseemly procedure or intimates that it might be regarded as unseemly, but that is as far from the question of jurisdiction as the North Pole. 26

The Court: I did not say exactly that. I said I believed in orderly procedure, and I did not want to do anything that was not orderly procedure, but the question here is not setting aside the Receivership orders but setting aside the original orders by which Judge Manton made himself District Judge and then created the Receivership. That is the question that bothers me.

Mr. Tuttle: We say those orders cannot be attacked in a collateral proceeding. Certainly they cannot be attacked thuswise unless the orders were absolutely void for an absolute lack of jurisdiction. If they merely represent an improper or erroneous exercise of jurisdiction, then there is no power, sir, in a coordinate judge to act as an appellate tribunal and override that. 26

The Court: But you are not acting as an appellate tribunal if you do that at all. It is not acting as an appellate tribunal. I do not see how that comes up at all. Here they say receivers have been appointed by a judge who by whatever forms he went through did not follow the rules of the court, and, therefore, was not a person competent to appoint them. That is what they really say, as I understand it.

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Mr. Tuttle: Yes, but to sustain that there has to be this proposition; several propositions: First, that those rules were themselves applicable to a judge so acting; and, in the second place, that they being procedural rules, a disregard of them, even if erroneous, is equivalent to lack of jurisdiction, and that last proposition, as the first, we challenge.

Now I do not want to trespass except to make just this one additional point as to what I said about the de facto rule. If your Honor will be good enough to turn to page 30 of our brief you will see there a case that
693 went to the Supreme Court of the United States where there was an utter failure to designate formally. There was no designation on file of the Circuit Judge who said in the District Court.

You will find two other cases where there was an irregularity in the designation, or the designation was to a district in which the Circuit Judge afterwards did not sit, as in the third case.

The Court: Was that the McDowell case?

Mr. Tuttle: Yes; and yet in each one of those cases, although on two of them the attack was made right in the action itself, the action which the judge heard, the holdings were that the judges acts were de facto because
694 the absences of formal designation or the mistake on his part of the district in which he was assigned to was a mere irregularity.

Now, just—I need not discuss the cases, they are right before you. Just in closing what I have to say in order that our position may be completed by me on the record, I want to say that there were certain other considerations —I am not going to expand them at the present time— that apply here.

Now, in the first place, we say that there is no equity in this bill anyhow, so far, at least, as the Interborough action is concerned, *Brake Shoe* v. *Interborough*, because,

in the first place, there is no consent by the Interborough to the appointment of the Receivers in this Johnson action. Johnson is in the position of a mere stockholder of the Manhattan. He is not a stockholder of the Interborough at all. The best that he could claim would be that by virtue of the guaranteed dividends on the stock of the Manhattan he was an unsecured creditor of the Interborough.

The Court: There have been Receivers appointed for Manhattan, too, haven't there?

Mr. Tuttle: Yes. The Receivers were appointed on intervention of the Manhattan at the time. And I need 26
not discuss that, because I know from a prior matter I had before your Honor that you are entirely familiar with the decisions of the Supreme Court of the United States that no bill for a Receiver can be presented by an unsecured creditor unless, indeed, there is the consent of the defendant.

The Court: That only goes to the extent of the relief that will be granted to him here, I suppose, doesn't it?

Mr. Tuttle: Well, the original action, the action in which Judge Manton entered his orders, was not a Manhattan action at all.

The Court: I understand. 269

Mr. Tuttle: Manhattan was not a party to it. It was simply the Interborough and the American Brake Shoe.

The Court: Manhattan did consent in that action, didn't it?

Mr. Tuttle: Yes.

The Court: And Interborough did too?

Mr. Tuttle: And thereby conferred the jurisdiction required by the Supreme Court decisions.

The Court: Interborough did also?

Mr. Tuttle: You mean Manhattan did also.

The Court: I asked you about the Manhattan first.

Mr. Tuttle: O, I did not catch that.

The Court: And in this case, of course, they have not consented.

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Mr. Tuttle: They have not consented.

The Court: I know.

Mr. Tuttle: So we say that does not go just to the relief that they may obtain, it goes to the very essence of the bill itself under the decisions. An unsecured creditor cannot apply for equity jurisdiction of this character because the jurisdiction without consent rests upon certain interests which an unsecured creditor does not have. It is only when there has been a return nulla bona and then the court, to aid the execution, takes an equitable jurisdiction. Without that there is no equitable juris-
699 diction unless, indeed, it assents, says the Supreme Court of the United States. The absence of jurisdiction—can we press that consideration, your Honor?

The Court: And is that in the case too?

Mr. Tuttle: I am putting it in my brief. Yes, it is in the brief.

The Court: Oh, it is in the brief?

Mr. Tuttle: Or at least it was in the draft of the brief I saw last night. I have not seen the brief as finally printed.

Mr. Pettigrue: It is taken out.

Mr. Tuttle: If it was taken out it is put back again.
700 Now, can we call attention to the fact that there is no compliance here with Equity Rule 27, which has to do with a suit by stockholders seeking equitable relief.

Your Honor will, of course, bear in mind, finally, that we are here in response to an order to show cause. We have not answered, we have not appeared generally in this action of Johnson and the intervenors.

The Court: You say that the causes of action are not joined?

Mr. Tuttle: Under Equity Rule 27, no. That is the one we have here.

The Court: 26?

Mr. Tuttle: The one about stockholders' suits?

The Court: I have it; yes.

Mr. Tuttle: The only allegation that is here in issue is simply this: "On information and belief that the plaintiff herein, Benjamin F. Johnson, is a resident of Winchester, Kentucky, and a citizen of Kentucky and is a record holder of 100 shares of defendant Manhattan Railway Company, hereinafter called Manhattan Company, having a par value of $10,000."

And that is now at the time the bill is filed. There is nothing said about when he got it or whether he had it before the acts of which he now complains took place, and therefore I say there is the lack of compliance with 270
that. I also again repeat that we are here in response to an order to show cause, presenting the cause which we have, and that we have not filed an answer and have not as yet generally appeared in the action.

Now with those observations I ask your Honor's permission to turn the argument over to Mr. Guthrie.

The Court: You have not generally appeared yet?

Mr. Tuttle: No, sir.

The Court: You haven't come up to that?

Mr. Tuttle: No, sir.

The Court: You have been served with process?

Mr. Tuttle: Yes, sir.

The Court: You have not appeared? 2703

Mr. Tuttle: I am told we are served with process.

The Court: And you will have to appear. It is taken pro confesso. You are here in court.

Mr. Tuttle: Well, we would have to appear generally if this action is based on adequate jurisdiction. We of course are contesting that question.

The Court: You mean it will have to amend to comply with 27?

Mr. Tuttle: Not only that this bill itself on its face does not show the equity, but we take the position which

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I have been arguing during the morning, that complainant cannot come into this court.

The Court: That is the locus standi question?

Mr. Tuttle: We say that we would be entitled to present these considerations on special appearance in answer to the order to show cause. Now, may I assign the argument over to Mr. Guthrie?

The Court: Yes.

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MR. GUTHRIE'S ARGUMENT.

?705 Mr. Guthrie: If your Honor please, Mr. Tuttle has so fully covered the various points that I must ask leave to repeat some of the arguments which he has presented. I shall devote myself particularly to the designation of the Senior Circuit Judge and the effect of the rules which this court adopted on June 30th and which are identified as Rules 1-A and 11-A.

Now, there is no question as to the binding effect of those rules on the District Judges, who entered into the agreement, whether those so-called rules were adopted under Section 27 of the United States Code, Section 23 of the Judicial Code or under the general powers of the ?706 court to make rules that is conferred by statute.

If, under Section 27, there is an agreement as to the division of business, we urge that such division of business is not binding upon the Senior Circuit Judge when duly designated to hold a District Court. If it is treated not as a division of the business and a distribution of the trial of cases and the entertaining of motions, then we say that these rules were not properly adopted because, in the first place, not concurred in by a majority of the Circuit Judges, if treated as rules in equity, which we assert they are essentially. And if to be treated as general rules under the powers of the District Court to make rules for the regulation of the business of the court, then

that those rules are inconsistent with the statutory provisions to which I am about to call your Honor's attention again and with the provisions of the Equity Rules prescribed by the Supreme Court under authority of Section 730.

Now, if your Honor please, I think it is as well that we should understand at the outset the status of the Senior Circuit Judge when duly designated to hold a District Court.

Does he thereby become a District Judge, or does he simply thereby become entitled to hold a District Court, with all the authority and jurisdiction of a District Judge 270
in holding that court? The Supreme Court of the United States has authoritatively declared that when the Circuit Judge is designated to sit under Section 22 of the United States Code, and I am always using the numbering of the United States Code, but I will use the numbering of the Judicial Code as your Honor prefers.

The Court: Well, it is a little easier on the Judicial Code for me, because that is the only one I have here.

Mr. Guthrie: Well, then, when designated under Section 18 of the Judicial Code. Let me read, even if it is repetition, what the statute says with regard to the power and authority of the Circuit Judge under certain circumstances. Section 18 provides that: 270

"The Chief Justice of the United States or the Circuit Judges of any Judicial Circuit or the Senior Circuit Judge thereof may, if the public necessity require it, designate and assign any Circuit Judge of the Judicial Circuit to hold a District Court within such Circuit."

And to repeat what the Supreme Court of the United States has pointedly decided, that he does not become a District Judge but that he continues a Circuit Judge authorized to hold a session of a District Court.

Now, what are the powers conferred on that Circuit Judge so designated? A. The statute reads:

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"During the period of service of any judge designated and assigned under this chapter, he shall have all the powers and rights and perform all the duties of a Judge of the District Court or a Justice of the Court to which he has been assigned excepting the power of appointment to a statutory position or a permanent designation of newspaper or depository of funds."

And again the statute provides in Section 19 as follows:

"It shall be the duty of the District or Circuit Judge as designated and appointed under either of Sections 17
2711 to 22 of this title to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district."

And of course that means before the District Judges of the said district.

The Court: I was just wondering, have you got an extra copy of your brief?

Mr. Guthrie: Certainly.

2712 The Court: I had one, but I misplaced it. If I had another one, it would be easier for me to follow you.

Mr. Guthrie: (Handing copy to the Court.)

The Court: Thank you very much.

Mr. Guthrie: Now, if your Honor please, I suppose it is unnecessary to repeat to you the language of the Supreme Court in the Washington-Southern Company case in 263 U. S., where the unanimous opinion of the Court declared, at page 635:

> "But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true whether the court to which the rules apply be one of law, of equity

> or of admiralty. It is true of rules of practice prescribed by this Court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred."

And I shall shortly argue that, taking your own Honor's construction of these rules or these provisions as rules under the general rule-making power of the court, they are in practical effect so, not to mention intent, but certainly practical effect tend to restrict the jurisdiction conferred by statute upon a Circuit Judge so designated under Section 18 of the Judicial Code. 271

Now, we contend, differing in that from the view expressed by your Honor, that Section 27 of the United States Code, or Judicial Code, Section 23, deals with the particular subject of division of business and the assignment of causes, and we say that the rules which your Honors have formulated deal with the division of business and the assignment of causes. That is the subject matter of those rules. And therefore, having been dealt with by a particular statutory provision, they no longer come under the general rule-making power of the court conferred by some other general statutory provision.

On the other hand, to repeat, if these provisions or rules 1-A and 11-A are rules and do not derive their authority from Section 23, which provides for the agreement of the District Judges in respect of the division of the business of the court and the assigning of causes for trial, then they violate the provisions of the statute to which I shall shortly refer. 271

Now, for purpose of argument, may I not analyze your rule 1-A. You have the statute conferring the broadest powers and jurisdiction upon a designated Circuit Judge, and you have here a provision, whether you call it a rule of court or an agreement, which provides that a Judge so designated shall do such work only as may be assigned to him by the Senior District Judge.

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Now, your Honor intimated this morning that the minimum which, in reasonableness, this would require, would be an application or a request from the Senior Circuit Judge so assigned, to the Senior District Judge. For what? I answer it. For permission to do any work in the court which he is authorized to hold by statute, or to exercise any jurisdiction which is expressly conferred upon him by statute.

How striking the words are, "He shall do such work only as may be assigned to him by the Senior District Judge."

2717 In other words, he can do nothing as a Judge, he can exercise none of the jurisdictions conferred upon him by statute, he can exercise none of the judicial powers, he cannot hold a District Court as expressly empowered by statute to do, unless the Senior District Judge sees fit to grant him permission.

Now, under so-called Rule 11-A, this Judge who, by statute, is authorized to hold a court of equity, who by the express language of the statute as emphasized by the Supreme Court of the United States in its opinion in Craig *v.* Hecht, to hold a District Court sitting in equity, that Judge so designated and so vested with jurisdiction

2718 by statute, can not entertain an application for the appointment of receivers in equity causes.

Of course, if your Honor please, the fact that these provisions were denominated rules as distinguished from agreement, the fact that they were the essence of agreement among the Judges, the eight Judges who made them, is immaterial. If they were made under Section 23 of the Judicial Code, which is 27 of the United States Code, the authority for them was the agreement of the Judges among themselves, that is the District Judges, not to make rules binding on their successors; not to make rules binding on a designated Judge, but an agreement among themselves, binding upon them, that if they could not

agree to the proper division and distribution of the work of the court, then the Senior Circuit Judge could intervene and determine what the division and what the assignments should be.

It seems to us that the clear intent and purpose of Section 27, or 23 under the Judicial Code, in the light of the conflict between the District Judges in regard to the trial of cases and, sometimes, their inability to agree, that the essence of the intent and purpose of Section 23 was to authorize the District Judges to agree among themselves on the division of the work of the court, and if they were not able to agree among themselves, then 272
the Circuit Judge should assign them to the various parts and make the necessary divisions of the work of the court.

The Court: Well, in that Case v. United States, the District Judges there submitted the question for division to Judge Sanborn, and isn't that the normal procedure, if they cannot agree?

Mr. Guthrie: I think, if your Honor will look at that case again, you will see that there was there a statute of Congress which confirmed the division of the districts as made by the Senior District Judge.

The Court: Later on, yes, but that was a later case 272
that came up the following year, ex parte Briggs, as I recall it, but this one here——

Mr. Guthrie: My recollection of the case is that the Act of Congress preceded the case of Case v. United States.

The Court: No, I think it preceded it, a very extraordinary situation there that I have not been able to gather even from the record that I read at the Bar Association. This finding of Judge Sanborn is that whereas the Honorable Williams and Kennedy, District Judges, did not agree upon the division of business, the assignment of cases for trial in the District, and have submitted

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to the undersigned as the Senior United States Circuit Judge of the Eighth Judicial Circuit the question of such division. It is perfectly evident that the Judges agreed to disagree and said, we will leave it to Judge Sanborn to settle.

Mr. Guthrie: Well, you will notice that that case dealt with the geographical division.

The Court: Oh, yes, they split it into two divisions.

Mr. Guthrie: And that is hardly analogous with the present case, and hardly an authority bearing upon either aspect of the question which is before your Honor, name-
2723 ly, whether these rules were adopted under Section 23 or under the general rules of practice.

The Court: That is only one of the questions. The other one is, when you have Section 23, you ought to separate the request to deal with the division of business, or that comes from the District Court, normally, at least—of course you can conceive that there might be some situation that initiative might have to be taken by the Senior Circuit Judge, but I should think that normally it would be the other way.

Mr. Guthrie: There was a suggestion this morning of the possibility of the disturbance of the business of the Court, the disruption by reason of disagreement among
2724 the Judges, whether regularly appointed or specially designated. It seems to me that that was contemplated by the statute and when they vested the power in the Circuit Judge to supervise the execution of that agreement, the subject was dealt with.

There was no occasion to deal with the subject of an agreement between the Circuit Judge designated to hold a District Court in the District, and the other or regularly appointed District Judges, because the statute fixed the jurisdiction and the powers of a Circuit Judge holding a District Court and the other Judges in that court at the time, the regularly appointed District Judges could

not, by any agreement among themselves, or by any rule that they saw fit to adopt, restrict or limit the jurisdiction of that Circuit Judge so holding a District Court.

The Court: Let me ask you one or two questions, Mr. Guthrie. It is perfectly obvious that the Circuit Court of Appeals is an entirely distinct court from the District Court, that is true, isn't it?

Mr. Guthrie: There is no question about that.

The Court: Now, the arrangement of the first twenty-three sections of the Judicial Code provides a somewhat plastic arrangement as to personnel, but I think if you read those over you will find that there is a certain condition precedent that has to occur, whether it is a case of the Senior Circuit Judge going down to the District Court, or a District Judge being asked to go up to the Circuit Court of Appeals, because they often are asked to sit up in the Circuit Court of Appeals when they need extra assistance. Now, the point of the whole thing is, when there isn't any disagreement among the District Judges, because that is something that I can take Judicial notice of myself, obviously, and also which is perfectly beyond challenge. 27

Mr. Guthrie: There is no question about it.

The Court: Now, how does the operation of Section 23 ever commence if there isn't a disagreement among the District Judges? It seems to me perfectly incredible that a person can designate himself, a man who is really intended by Section 23 to be a peacemaker between District Judges, could designate himself and thereupon create a disagreement and then, in view of the disagreement, say that he was re-allocating the business, as he would have the power to do, if the condition precedent of disagreement among the District Judges had occurred. 27

Mr. Guthrie: I am not suggesting, under the language of your second rule, which I think was unfortunately

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worded, I am not suggesting that the Senior Circuit Judge can create a disagreement.

The Court: Well, that is what this order says.

Mr. Guthrie: You are not dealing with what the order says, but you are dealing with substance, not with words; you are dealing with the power of the Senior Circuit Judge, and the statute vests jurisdiction in him to hold a District Court, and you can not take that jurisdiction away from him by agreement of the District Judges. That is our position.

729 To repeat, the order, whether it is a rule or an agreement or under the authority of Section 23 of the Judicial Code, and 27 of the other, is wholly immaterial. The essence of our contention is that the District Judges can not agree among themselves to clip, to lessen, to limit, to curtail the power of a duly designated Senior Circuit Judge who is vested with the jurisdiction conferred by statute.

The Court: What business have counsel got to go with a District Court case to anybody except a District Judge?

Mr. Guthrie: I would not say that that may create confusion. It has not in the past. The confusion will
730 only be created because of these new rules. But if you say it creates confusion, that is an argument addressed to Congress. You can ask for the repeal of these statutes conferring the power and imposing the duty upon the Senior Circuit Judge, if designated, to hold a District Court and to exercise all the powers of that Court granted to him by the statute.

Now, if your Honor pleases, we are of opinion that this division of business is not within the purview or scope of any rule making power, that it is clearly the intention of Congress to confer the power of agreement upon the District Judges themselves personally, and if they are unable to agree, then the supervisory power of

the Senior Circuit Judge comes into play. We find no case where this section has been considered by the courts in the aspect in which it is presented to you today for determination, but we find a case, which we have printed upon our brief, in Montana, where substantially the same situation was presented, where there was a provision of the statute authorizing the Judges to agree in regard to the division of business, and another provision of the statute authorizing them to make rules, and the court held that the division of business was a matter personal to the Judges, that it was not binding upon their successors, that it did not come within the purview of the rule 27
making power, and the case concluded, "Because the distribution of business is personal to the Judges, it is not a subject within the purview of court rules, and Rule No. 2, adopted in 1905, while effective as the expression of the will of the Judges in office at that time, is not binding upon the present Judges."

The next point that I desire to take up with your Honor is that this is, if a rule——

The Court: If this is a rule?

Mr. Guthrie: If these rules, so-called Rule 1-A and 11-A, are to be deemed rules, they are essentially rules in equity, because they provide for the regulation of the 27
court of equity especially directed to the consideration of causes and applications for the appointment of receivers in equity, and if so regarded they are invalid, because, as suggested by your Honor this morning with regard to equity rules governing the practice in equity in the District Court, the District Courts cannot make any rules without the concurrence of a majority of the Circuit Judges for the Circuit.

Last year, when you dealt very fully with the revision of rules, including equity rules, the records of the Court show that you obtained the concurrence of a majority of the Circuit Judges. We fail to find any record of any

concurrence whatever of a majority of the Circuit Judges to these rules 1-A and 11-A which, if they apply to equity causes, if they apply to applications to a court of equity for the appointment of receivers in equity, are, from our point of view, clearly rules in equity.

Now, analyze the present rules in equity as prescribed by the Supreme Court of the United States. You have here a rule that a Judge authorized to hold a court of equity under Sections 18 and 19 of the Judicial Code, that is a District Court sitting in equity, you have a rule applicable to the rule 6, that the Judge may at any time
2735 and place and on such notice, if any, as he may consider reasonable, make and direct or annul orders, rulings and proceedings, and is competent to hear all causes; and you have also under Rule 79 that the District Court may make additional rules, provided they secure the concurrence of a majority of the Circuit Judges for the Circuit.

Therefore, if these are, as we earnestly submit they are, rules in equity, because they govern applications for receivers in equity, because they attempt to govern the work of the equity judge so designated, because they restrict and curtail the jurisdiction conferred upon him by the statute, we submit that if valid at all, they could only
2736 become so if the District Judges had procured the concurrence of a majority of the Circuit Judges in this Circuit.

I now take up the other aspect of the rule-making power. Where does this Court get its power to make rules, if not in the old provision of the Revised Statutes contemporaneous with the organization of the Court, now known as Section 731:

"District Judges may from time to time and in any manner not inconsistent with any laws of the United States or with any rule prescribed by the Supreme Court under Section 730"—I am reading from page 17 of our brief.

The Court: Yes.

Mr. Guthrie: (Continuing) "The District Courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under section 730 of this title, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." 273

Now, we say that those rules are inconsistent with sections 18 and 19 of the Judicial Code, vesting full jurisdiction in a designated Circuit Judge, and that they are inconsistent with the rules of the Supreme Court under section 730, because they clearly regulate practice in equity; they prevent the Judge so designated from exercising any jurisdiction in equity unless the Senior District Judge sees fit to grant him permission to exercise that statutory jurisdiction.

The Court: I do not think it clear that they can't practice in equity. It is just indicating the place where you must go to practice when you have equity. 273

Mr. Guthrie: Well, your Honor said it was a rule—you called it, with all deference you called it a "calendar rule". I don't care what kind of a rule you call it, or conceive it to be, you get your power to make these rules from Section 731, and you cannot make a rule which, in practical effect, would restrict and curtail the power conferred by statute upon a duly designated Judge.

The Court: That is the part that I can't follow you at all, Mr. Guthrie. I can't follow it at all. A man is designated for the District Court, and there he goes to the court, and that court has its rule. Why isn't he subject to those rules? That is what I can't understand. He is not superior to them.

Mr. Guthrie: Well, then, that is for Congress.

The Court: He is designated to that court.

Mr. Guthrie: No. He is designated to hold a District Court. You may say well, what is the difference. Well, the Supreme Court thought there was a difference in the Craig case, emphasized the difference.

The Court: What did they say?

Mr. Guthrie: They said that he was not a District Judge but a Circuit Judge assigned to hold a session of the District Court. The statute says that he may be designated as assigned to hold a District Court, not to
2741 sit in the District Court, but to hold a District Court.

The Court: All right.

Mr. Guthrie: And then it goes out of its way——

The Court: Well, then, if he holds a District Court in this District, doesn't he have to do it under the rules of this District?

Mr. Guthrie: You say rules?

The Court: Yes.

Mr. Guthrie: If those rules——

The Court: Under the valid rules of this District, we will say.

Mr. Guthrie: Valid, of course, if those rules are not
2742 inconsistent with the jurisdiction conferred; but if those rules are mainly such as to prevent him exercising that jurisdiction, could you imagine anything more highly calculated to restrict the jurisdiction of a Judge than to provide that he can only do such judicial work as some other Judge may permit him to do?

The Court: I don't know. I think that is a very salutary and sensible rule when you have a great deal of business.

Mr. Guthrie: It may be a salutary and successful rule, but the thoughts—you cannot escape from the conclusion, in the very statement of it, that he is bound by it, you cannot escape from the conclusion that it limits

and restricts his jurisdiction, just as here you are asked to hold that he had no jurisdiction to hold a court of equity, he had no jurisdiction notwithstanding the plain language of the statute, to hold a District Court; that he had no jurisdiction to exercise the rights and duties and powers conferred upon him by the statute because he had not seen fit, as intimated by someone here this morning, to go to the Senior District Judge and ask his permission to exercise judicial power.

I beg your Honor not to commit yourself offhand upon a proposition of such vital importance to the integrity of our judicial system. It may be unwise, and 274
a great many think it was unwise, to allow this dual capacity—the dual capacity of a Judge sitting one day or part of a day in the Circuit Court of Appeals and the other part of the day or the next day, sitting in the District Court; and many of us think it of doubtful validity, of doubtful wisdom. Others think it essential for the welfare of the Federal judicial system that we should have, if necessary and important cases call for it, the interposition of a trained Senior Circuit Judge. And your Honor will well remember in your practice that it was always the desire of counsel, if practicable, to have a receivership, particularly of a road running through two 274
or more great districts, as here in two districts, or two or more States, to have a Circuit Judge supervise the administration of the receivership.

I have been at the Bar for fifty-two years, and I have had, if I may say so, innumerable cases of railroad receiverships. For years it was my principal practice. And whenever a great system like this Metropolitan system, with its six hundred millions of property interest became involved, it was always the desire of lawyers, and it is perhaps still today—I am out of active practice, but it was always our desire if possible—to get a Senior Circuit Judge to appoint the receiver and thus exercise adequate and due control over the receivership.

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The Court: Of course, during a large part of that time that you refer to, Mr. Guthrie, the Circuit Court was the only one and the Circuit Judges were the only ones who had the equity jurisdiction.

Mr. Guthrie: That is quite true; but since the creation of the Circuit Court of Appeals——

The Court: January 1st, 1912.

Mr. Guthrie: Well, it is a generation. And at that time the question came up, shall we preserve the power of these Circuit Judges; shall we create this duality; shall we allow a Judge to sit in an appellate capacity one
747 day, to step down and take charge of important matters in the court below the next day. And the Bar was divided, as you may remember.

The Court: Yes.

Mr. Guthrie: I distinctly remember it. And you may remember how Mr. Choate and others urged that it was a wise thing to do, that we wanted to preserve the experience and supervisory power of Circuit Judges in important litigation. It may be that as it has turned out, particularly now as we are increasing the number of District Judges in various districts, it may be that it would be wise not to subject them to this—I think somebody used the word this morning—disturbance of their busi-
748 ness; it may be that it would we wise to say that the Circuit Judges shall hereafter only exercise appellate jurisdiction, as it has become advisable in the handling of our judicial systems for the Judges of the Supreme Court to exercise as little as possible in the original jurisdiction.

But as long as the statute prescribes the rule, your Honors, while adopting a rule entirely valid and binding as between yourselves, cannot adopt a rule which shall deprive, practically deprive, the Senior Circuit Judge, or any Circuit Judge when duly designated, of the power expressly conferred upon him by statute.

We are not here to criticize these rules, but I must say that in any event they may require revision. You say that applications for a receiver shall only be made to the Judge sitting in the motion part. Suppose that Judge is not available or, to use the phrase of the day, not get-at-able, and it is important to have immediate relief; supposing the Senior Circuit Judge is not readily get-at-able; are our duly designated Circuit Judges sitting here to have their hands tied and unable to work because, vis-a-vis, they can not get the permission of the Senior District Judge to perform their judicial duties and exercise their judicial powers?

Your Honor referred to the case of Galveston Company.

The Court: Yes.

Mr. Guthrie: Where Circuit Judge Learned Hand wrote the opinion, and where Circuit Judge Manton and Judge Chase sat.

The Court: Yes.

Mr. Guthrie: You will remember that in that case Judge Learned Hand spoke of the limited power—the limited power—of the District Court under section 731 to make rules for its own procedure, "but somewhat more limited still," he said, "and earlier in origin, the power given to the Supreme Court in equity and admiralty." Then he proceeded—shall I read?

The Court: I have read it during the lunch hour.

Mr. Guthrie: Let me conclude my argument, perhaps, with this quotation:

"It is the result of the exercise of a power to legislate delegated by Congress,"—This is the rule-making power—"though circumscribed by the statute which gives it, and by anything contained in the general laws, or the Supreme Court rules, as the statute itself declares."

It is only within these limits that the District Court can make rules.

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We therefore submit——

The Court: Well, he says further, "Within these limits the District Court may disregard existing practice as freely as Congress itself; its action has the force of law and we are as much bound to observe it as a statute."

Mr. Guthrie: Yes, within those limits. Our contention is that you have exceeded those limits.

The Court: Yes, exactly. The whole question is whether these rules, 1-a and 11-a—with my own theory as I have heard the argument today is, as to the second order, that you cannot escape from them—I think that
2753 the only question really is, if these are a valid exercise of the District Court's rule making jurisdiction. And if they are valid, why wasn't Judge Patterson the only person who might be approached on the subject of equity receivership?

Mr. Guthrie: Why, if they are valid, of course he ought to have been applied to. If they are valid, Judge Manton should not have presumed to do a thing without permission of Judge Knox. Now that, we submit, was never intended by Congress.

The Court: That is the crux of the thing. If these things are valid, then Judge Manton was not acting
2754 within his powers in appointing the receivers, isn't that right?

Mr. Guthrie: Why, he was acting in disregard of what you would call a badly adopted rule of the court, which we say was not validly adopted, binding neither in equity nor as a general rule.

The Court: Have you anything which you want to say about tihs question of *locus standi* of the plaintiff, Mr. Guthrie? That is rather interesting, I think, from what was said about it. It has struck me, as I have listened to it this morning, and thought about the case during the day, that if the defendants both have a stockholder interest in the defendant, assuming, of course,

that their bills are proper in form under the equity rule—I have not looked at them, of course, but if they have a *locus standi* to challenge the appointment of receivers in this other case, because the defendant was a company in which they had an interest—in other words, their *locus standi* would come from being security holders in the same company in which the receivers were appointed, and that they would not have to go into the Brake Shoe case and subordinate themselves to that case by an intervention, that is the thing that interests me very much.

Mr. Guthrie: Would your Honor permit me to answer that in a two-fold aspect? 27

The Court: Oh, yes, indeed.

Mr. Guthrie: This bill of complainant Johnson is demurrable. No stockholder of the Manhattan Company can file a bill for the appointment of a receiver of the Manhattan Company in a case where the Manhattan Company does not appear or has not appeared and does not consent. Certainly a stockholder of the Manhattan Company, which is a lessor, can not file a bill to have a receiver appointed of the Interborough, which is the lessee.

The Court: Yes, but Mr. Boehm represents an intervening interest against the Interborough, you see.

Mr. Guthrie: Well, what of it? You—— 275

The Court: Well, I don't know.

Mr. Guthrie: He is not a judgment creditor. You haven't any consent here before you. How can you entertain this bill to appoint receivers for these two corporations on any such allegations as you find here? Is there a single case in the books where the receivers have been appointed by a court of equity under such circumstances?

The Court: I don't know. The circumstances always change. What I want to get at, it might be that it would be premature to appoint other receivers, but you might

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possibly feel that that order of Judge Manton's was not valid, and that therefore the present receivers should be set aside and the present receivers would be removed, their appointments would fall and then you would have to arrange some sort of supersedeas and let the matter be tested on appeal. That would be a perfectly feasible way to do it, if they have a *locus standi.*

Mr. Guthrie: Is there any practice known in equity of a man who claims that he is interested in the subject matter of another suit, filing a bill against the parties in that other suit and asking the court to set aside some
2759 order made in that other suit? There is no such practice known to equity and no authority can be cited sustaining it.

What they should have done in the orderly procedure was to have appeared, and I believe they did appear before Judge Manton, although in a suit which they themselves started, a separate suit which they themselves filed, known as the Barber suit, in fact appeared in the Brake Shoe case. For twenty-seven days notice was being published in the press inviting all parties in interest to show cause why receivers should not be appointed for these two corporations. Nothing has been done fur-
2760 tively; nothing has been done behind doors in this matter.

The Court: I know. Nobody is talking about that.

Mr. Guthrie: It has all been open, with the fullest notice to everybody, these very attorneys present in court, and after twenty-seven days of notice they deliberately refrained from presenting their objections to Judge Manton to the appointment of these receivers and the appointment of the solicitors. They admit that Judge Manton, in appointing these receivers, was granting a relief which they themselves want, and they admit it to your Honor now today; they concede that the Interborough is insolvent; they concede that the Manhattan is insolvent; they ask for receivers, and their only griev-

ance is that they would like receivers of their own choice, and some other solicitors appointed. Surely that is a matter that should have been presented on proper statements of fact, proper objections, to Judge Manton, when this order to show cause was published for twenty-seven days. Judge Manton could have passed upon the merits of their objections to these two receivers and to the proposed solicitors for the receivers and, had those objections been overruled, they could have had their remedy by appeal. Certainly this roundabout procedure of going to another Judge and asking him to set aside the action of a Judge of the same court ought not to be sanctioned or tolerated excepting in the clearest case of want of jurisdiction, and then certainly not on the application of stockholders of the Manhattan Company or even stockholders or bondholders of the Interborough Company. They have no right to ask for a receiver without the consent of the companies. 27

The Court: Well, they have a right to ask for a receiver. They may not get it without the consent of the company.

Mr. Guthrie: Oh?

The Court: Well now, it is not, perhaps, quite so easy. If it came to the question of an appointment of a receiver, why couldn't they use the answers that have been filed in the Brake Shoe case in order to establish the basis for being the ground for receivership, the admissions in that case to be used on a motion for receivership in the cases that they have here? I do not see why that should not be. 276

Mr. Guthrie: Those answers were put in for the purposes of that suit.

The Court: Yes, but that is always the case.

Mr. Guthrie: And not in any other suit, for the purpose of authorizing the Court to appoint receivers against the consent of the defendant corporation. There is no such practice.

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The Court: I know, but it is a well known thing that you can put in pleadings as admissions, and I should think that that would be an inescapable difficulty. And the thing that really, to be quite frank, causes me the most difficulty about the thing is that *locus standi* question. I don't believe that—I can't think that they would have a *locus standi* if their papers are sound, if they are proper documents. I do not see how they could, really. Mind you, I don't pretend to know it all or anything like that, but I don't see how they can get an agreement in that case and raise the point that they are raising here.
2765 In other words, for every alleged wrong there must be some sort of remedy. Now, wouldn't that come under the equity rules and require the intervenors to subordinate themselves to the Brake Shoe case? And then, after ratifying the situation there, how could they attempt to upset it for such reasons as they are giving here? I don't see how they could do it.

Mr. Guthrie: Couldn't they challenge the jurisdiction in their intervention petition?

The Court: No, I do not think so, because you——

Mr. Guthrie: It is not the jurisdiction of the Court, if your Honor please——

2766 The Court: They could challenge——

Mr. Guthrie: It is the jurisdiction of the Judge.

The Court: They could challenge the jurisdiction of the Court, but the only difficulty here is——

Mr. Guthrie: There is no challenge of the jurisdiction of the Court there.

The Court: No, and I say it is not a question of the jurisdiction of the Court. It is a very unique, a serious question. It is not by any means an easy matter to characterize and put it in a particular category. I thought as the argument developed this morning that it would fairly be described as a claim of abuse of power in doing so and that the Judge did not have, so to speak, judicial

jurisdiction, if that means anything. But, as I confess, it is a difficult question.

Mr. Guthrie: If Judge Manton, according to their view, was violating the law, this rule, though we contend it is binding as a statutory rule——

The Court: You mean just lacked jurisdiction?

Mr. Guthrie: Just lacked jurisdiction; they could have sought relief in the Circuit Court of Appeals, a prohibition or mandamus could have issued. Isn't that the orderly procedure?

The Court: I don't know. I never heard of but one case where a prohibition issued under our statute, except 27
in admiralty cases. There was one case, or perhaps two.

Mr. Guthrie: The language of the statute is quite broad.

The Court: I beg pardon?

Mr. Guthrie: The language of the statute conferring jurisdiction of prohibition is quite broad.

The Court: I know it is, but if you will look at the cases——

Mr. Guthrie: And this would be a singularly proper case.

The Court: I had so many of those cases, I had to look them up, and I never saw but one that was not con- 276
fined to admiralty; I thought the statute was confined to admiralty.

Mr. Guthrie: May I call your Honor's attention to the fact that in the order published, the order to show cause why permanent receivers should not be appointed, which was published in the press, Judge Manton specifically provided that "any other creditor of the defendant or other party in interest may be heard."

The Court: I don't see that. What page is it?

Mr. Guthrie: Page 32 of this record. And the same thing in the Manhattan order. And that is the practice that for years I used to follow in these cases all over the

country. And if parties in interest objected to the receivership, why, they would come in on the return day of the order to show cause and challenge jurisdiction. What prejudice is there in subjecting themselves to the jurisdiction of the court in a case where the court has jurisdiction? There is no doubt whatever that there was a diversity of citizenship here in the Brake Shoe case. There is no doubt that the District Court had jurisdiction. There is no doubt that there was proper proof, that a proper bill had been filed. The only question is that the Judge did some, we will say, arbitrary act, or
771 some act without authority or some act in contravention of a rule of the court.

It seems to me that the orderly practice would be—certainly that is what we would have advised a client to do—to challenge before the court, challenge his power to appoint a Receiver, and say to him, "You cannot do it because these rules of the District Court are valid," and if that objection is overruled, to appeal. That is the orderly way to handle the business of this court. You have got a supervisory body there in the Circuit Court. And then I think if that Circuit Court did not given then satisfactory redress, they could go to the Supreme Court
772 of the United States. At any rate let us have this question, if it is to be passed upon by the Circuit Court of Appeals and the Supreme Court of the United States, passed upon in some regular, known, orderly practice in equity and not such an anomalous proceeding as we are having here, of which your Honor can find no precedent. No precedent can be cited to you, and you have simply the speculation that, should not a man who claims that he has an interest in some other person's suit go to some judge and ask him to set aside that suit.

The Court: It is not an interest in some other person's suit. It is an interest in a defendant and the Receiver appointed; it is his own interest. I do not think

there is very much in that, if you pardon me saying so. I may be quite wrong about it, but it does seem to me that when he is a security holder in either or both of these companies represented here, why, he would have his right to say, "We do not like to have that Receiver because we do not think he was legally appointed." That I don't know.

Mr. Guthrie: Well, they have a right to claim anything, but are you going to reach out, exercising the responsibility of the jurisdiction of this court, and establish such a precedent?

The Court: The most difficult question in the case, it 27
seems to me, is that locus standi question. I do not think that the other thing presents so much difficulty. But that is a little bit difficult. You don't treat it in the briefs at all?

Mr. Franklin: Yes, it is in our briefs. In our supplemental brief at page 7 we refer to the case of *United States* v. *California Canneries*, 279 United States; also to Rule 37 of the Equity Rules, and also to the case of 58 Federal (2nd) 721, the Circuit Court of Appeals for the 8th Circuit.

The Court: What do they say? But wait until Mr. Guthrie is finished.

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Mr. Franklin: Certainly.

Mr. Guthrie: May I add one word, if your Honor please?

The Court: Yes.

Mr. Guthrie: It cannot be improper to say a word about the vital importance of an early settlement of this question, this conflict of jurisdiction.

The Court: Oh, surely.

Mr. Guthrie: It was suggested that it made no difference whether, in matters of jurisdiction and practice, $500 or $500,000,000 were involved.

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The Court: No, no, that wasn't it. It did not make any more difference to me whether a case of that much was involved or the other.

Mr. Guthrie: But it does make a difference in the public interest. We have here a situation in which everybody before you admits that a Receivership is imminently necessary and was when these Receivers were appointed.

The Court: That is common ground, I will concede.

Mr. Guthrie: The two men who have been appointed are men of the highest reputation in this community.

The Court: Oh, dear me! I know one of them very
2777 well myself. We are not dealing with that question, are we, or anything except this jurisdictional question?

Mr. Guthrie: You are dealing with it under this bill, which attacks the propriety of appointing these men; a personal attack is made upon them as it is upon the attorneys.

The Court: Yes, but I was not talking about that.

Mr. Guthrie: I know that you are not.

The Court: I was dealing with this purely as a jurisdictional question.

Mr. Guthrie: I am dealing with the whole situation.

The Court: Well, all right, sir.

2778 Mr. Guthrie: I think it my duty to urge your Honor to contemplate the mess which must result by establishing the precedent which you are now urged by our adversaries to make, when there is a perfectly simple and adequate remedy in the court that appointed these Receivers where, within a very few days, for we shall facilitate them in every way, a review of their alleged grievances by the Circuit Court of Appeals can be obtained.

We must earnestly urge that irreparable injury must result to these vast property interests in which the public is so vitally concerned from establishing any such precedent as would be established in the case if you should enter an order vacating the appointments made

by Judge Manton, and leaving this great railway system in the air.

The Court: Surely, Mr. Guthrie, you must realize that I would not do anything quite so foolish as that, no matter what decision I arrived at. Of course I would not. If I decide that Judge Manton did not have jurisdiction, and if I so hold, why, then I would suspend the operation of my order doing so for a period of ten days or something like that to enable the parties to take an appeal, and therefore there would not be any break in the continuity of the management of the concern. Not at all. I would not dream of doing that. And I also, if I should come to that conclusion, I certainly will give time enough for them to appeal, and suspend the operation of the order. You can do that. That is a supersedeas pro tanto. And then the Circuit Court of Appeals can do the rest and hold it up while they are deciding the question. So don't be worried about the railroad. I won't do anything so foolish as that.

Mr. Guthrie: Your Honor, of course, will appreciate the duty of counsel to mention the consequences of an adverse ruling.

The Court: Oh, yes. The court has to contend its common sense as well.

Mr. Stryker: May I say a word on behalf of the Protective Committee of the holders of the ten year 6% Gold Notes of Interborough Rapid Transit Company in opposition to this motion?

There are some $10,500,000 of these notes outstanding which become due on the first day of October of this year, and the interest accrued on those notes brings the total sum to $10,815,000.

After the argument of the leader of the American Bar discussing these points, I think it would be, indeed, supererogation for me to attempt to rehash them in any way. There are one or two aspects of the case, however, which, if your Honor is not now too tired——

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The Court: Go on; I will hear you a moment.

Mr. Stryker: You will bear with me a moment?

The Court: Absolutely.

Mr. Stryker: I would like to amplify by a word or two the brilliant and conservative arguments of Mr. Guthrie and Mr. Tuttle in regard to a collateral attack. Would your Honor turn for a moment to page 4 of my brief, if you happen to have it before you?

The Court: Yes, I was just looking at it now. Yes.

Mr. Stryker: Of ex parte Richards, where District Court Judge Keller said, "Holding as I do that these
2783 persons are not parties to the bill I must further hold that the question of jurisdiction to entertain the original bill cannot be raised by persons not parties to the suit upon a collateral proceeding."

Also a word—I don't know whether I have this on my brief or not—Luhrig Collieries Company *v.* Interstate Coal & Dock Company, 287 Fed.

The Court: Where is that on your brief, on the same page?

Mr. Stryker: I don't know whether I have it. I dug out these afterwards. It is Luhrig Collieries *v.* Interstate.

Mr. Tuttle: Page 30 of our brief.

2784 Mr. Stryker: In that case it was contended by them that the orders complained of on appeal were made by a circuit judge for whom, at the time the orders were made, no designation under Section 18 was on file in the District Court. So that the question has many interesting analogies to the situation presented here. In dismissing the bill the Circuit Court of Appeals said:

"All the orders made without designation by the Circuit Judge above referred to were prior to any right on the part of appellant to be heard in this cause. Therefore it has no right to complain about orders made before its rights accrued, but in any event the orders were made

by a de facto judge and cannot be assailed collaterally."

Now, there are a few things here at least platitudinous, and perhaps idle as it may be to say that they are not in controversy——

The Court: (Interposing): Unfortunately the law is full of platitudes.

Mr. Stryker: Pardon me if I mention a platitude or two in the course of my argument. Perhaps you will be patient with me. One of the things that is not disputed in this case is that Judge Manton is a judge of the Circuit Court of Appeals of the United States. Another fact that is not disputed is that under the provisions of the 27
Federal Statute he has the right to designate himself to hold a term of the United States District Court. And if I have understood the argument thus far, it is that those two facts are not disputed, and the only question is as to whether, in having so designated himself, he violated some rule adopted by the judges of this court which was binding upon him.

Now may I direct your Honor's attention to page 5 of my brief to just a bit of language from the United States Supreme Court, written by Mr. Justice Matthews. This case was to the effect that a party who desired to set aside an order must adopt the proper remedy of ap- 27t
peal, and now let me read what the Supreme Court of the United States held, as this may be vital to the whole situation:

"The rule is founded on deeper grounds of public policy in defense of the dignity and authority of judicial tribunals constituted for the purpose of administering justice according to law, and in order that their judgments and decrees may be invested with that force and sanctity which shall be a shield and protection to all parties and persons in privity with them. The rule therefore has respect to the court and to its judgments, and not to the parties, and no misconduct or demerit on their

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part except fraud in procuring the judgment itself can be permitted to detract from its force. It is equally true and well settled in the foundations of the law that neither misconduct nor demerit can be imputed to the court itself."

Now, if I have understood the argument in this court today, the courage as not been shown to make a direct attack, but obliquely, indirectly, inferentially, the position of our adversaries, if I have understood it, at least might be susceptible of that interpretation, and I wish to say that the Supreme Court has said that neither mis-
789 conduct nor demerit can be imputed to the court itself, it is an invincible presumption of law that a judicial tribunal acting within its jurisdiction has acted impartially and honestly; the records of its proceedings embrace verity, its judgments cannot be impugned except by direct process from superior authority; the integrity and value of the judicial system as an institution for the adminstration of public and private justice rests largely upon this wholesome principle.

Now, let us see this situation, if your Honor please. If I understood it correctly, there is something upwards of a half a billion of dollars involved here. These pro-
790 ceedings were had before a United States District Court judge; those proceedings have been acquiesced in by outstanding members of this community and their counsel, and you will find, if you will read the record of what has transpired before you, where petitions, for instance, of the first mortgage bondholders of which, as I recollect it, there are outstanding somewheres upwards of $182,-000,000, represented by the Davis, Polk firm, and the committee headed by Mr. J. P. Morgan, petitioned to intervene in this case before Mr. Justice Manton, and in that petition it was stated, I think at Paragraph 2 that these Receivers, naming them, were duly appointed by Judge Manton. And the same language is found in the

petitions of other committees representing enormous, almost fabulous sums of money in this case, all taking the position that the orders granted by Mr. Justice Manton were good orders and that the Receivers were good Receivers and duly appointed.

Now, of course, the views of counsel, the views of outstanding members of the community, naturally your Honor will not follow, but I think you will not ignore them at least as significant as the opinions of able and responsible people.

Now, you are asked in this case, if the Court please, not to set aside the Receivership and not to say that 279
these rules did not require the aegis of this court and the intervention of that Federal jurisdiction, oh no, not that, but you are asked to interfere with the orders of Judge Manton which have been approved by enormous financial interests in this case, at the instance of a man who says he is the owner of 100 shares of the stock of the Manhattan Company, and you are asked to do that not in the Brake Shoe case but in a collateral proceeding.

A great deal of discussion has been had here, if the Court please, in regard, if I have understood it rightly, to proprieties or something of that kind.

The Court: I don't want to hear about it.

Mr. Stryker: I have a point to make there, your 279
Honor. What I want to say is this. Now, with the orders of Judge Manton thus approved, I would like to call your Honor's attention, if you will just bear with me a moment, to amplify, if I can, what Mr. Guthrie has said, and I will make it very short, in regard to one judge of a court of coordinate jurisdiction intervening, I mean—well, taking jurisdiction of business upon orders of another judge. Now, platitudinous as that principle is, there is a sentence or two here from the highest courts which I would like to press on your Honor.

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I will have to leave these cases. Some of them I found after my brief was written.

(Informal recess.)

Now, if your Honor please, in Reynolds v. Silver Mining Co., 32 Fed. 354, Justice Brewer of the United States Supreme Court said, in the Circuit Court of Colorado way back in 1888, when he was asked to dissolve an injunction which had been granted by another judge of that court, I think that is on Mr. Tuttle's brief somewhere.

The Court: Yes, Mr. Tuttle's brief. I thought I was
2795 reading that.

Mr. Stryker: I don't know just what page it is.

The Court: Never mind. Go on, tell me about it.

Mr. Stryker: At any rate, he declined to do this and he said, there is just a line or two.

"I think that an orderly administration of justice requires, and justice itself, that in the long run and the general average be best secured if litigation commenced, before one judge continues before him until it shall be taken before an appellate tribunal."

Now another case, United States v. Rizenelli, 182 Fed. 675, at 678 the Court said,

"The general rule which forbids judges sitting in
2796 the same court from overruling for like reasons the decisions of each other does not have its origin merely in motives of personal courtesy but, as experience amply proves, rests upon considerations of a wise public policy. Any other course would tend to unseemly struggle in the court and would likely result in a weakening of public confidence in the soundness and finality of judicial decisions."

One more case and I will stop on that point.

The Court: Is that down on the brief?

Mr. Stryker: I don't know. I dug these out at the last moment.

The Court: Give me the citation of the last one.

Mr. Stryker: Yes, sir. That last case was United States *v.* Rizenelli, 182 Fed. 675.

Mr. Guthrie: We cover those on our briefs.

Mr. Stryker: What page of your briefs, Mr. Guthrie?

Mr. Guthrie: Page 22.

Mr. Stryker: Now I have one other case, the case being reported in 10 Federal (2nd) 937, Commercial Union *v.* Anglo South American Bank. That is also on Mr. Guthrie's brief, I am told.

The Court: What was that name?

Mr. Stryker: It is Commercial Union *v.* Anglo South 27
American.

The Court: Yes.

Mr. Stryker: Now, if your Honor please, it occurred in this circuit.

The Court: C. C. A. case?

Mr. Stryker: Yes, a C. C. A. case, 1925. In that case Circuit Judge Mack, holding a district court, denied the motion to dismiss the complaint because of insufficiency. At the trial the defendant moved to dismiss on substantially the same ground, that it failed to state facts sufficient to constitute a cause of action, and at the trial the motion was granted. On appeal the C. C. A. re- 279
versed, and here is what they said, and I think this language very much in point, to me:

"We are not aware that it has ever before happened that in the Southern District Court of New York or any District other than this Circuit, one Judge has, in effect, undertaken to set aside or ignore an order made by another judge of coordinate jurisdiction in the same suit."

Now, if your Honor please, the least that can be said about this main issue that is before you, the very least, I think, is that certainly there is a very honest difference of opinion with regard to the validity of these orders. Certainly the opinion of a man of the standing of Mr.

Guthrie, of his known character and standing at the bar cannot be just lightly cast aside. Your Honor will, of course, weigh it like any other opinion, but my point is this, that inasmuch as there is at the very least, at the very irreducible minimum, a fair difference of opinion as to the legality of what Judge Manton did, that I respectfully present to the court as an officer and as a friend of this court, not only in the interests of justice, in the interests of the court itself, not assuming jurisdiction here to set aside the order of another judge sitting in this building, sitting at the time as a District Court Judge.

Let me say this, that I have talked with counsel and, to the best of my ability, have tried to examine the law, but I have found no case in the Federal Courts where any such thing was ever done, and apparently the Circuit Court of Appeals down to 1925 was in a similar position.

Your Honor has said with that characteristic fairness which the people and Bar have so long known, that if you did decide to do this thing you would not disrupt it but would give everyone ample time to appeal. But there is a consideration beyond that, fair as that is, of course, that I should like to urge upon this court, and that is that the judgments and opinions of this court and of the particular member whom I have the honor to address carry weight and dignity in the community. Now, regardless of the ultimate outcome of this litigation in a different court, if I may say so, the order or the opinion somewhere in the litigation that Judge Woolsey thought something was the matter with this receivership will cast a kind of stain and reproach on it that no appeal will remove, and here are all these interests. Now, you know I mean that. Here are all these interests involved, and I submit that this Receivership should not be impugned by even that much, even though we, with great respect to the court, think that such decision would be tempered.

Now, if your Honor please, I want to call your Honor's attention to one other consideration. Before I do that, just one word. I do not think anyone has said—even the distinguished counsel, perhaps, has discussed collateral attack. There has been a lot of discussion about it, and about judges acting de facto and acting de jure. Now, as I understand it, a collateral attack cannot be made even in the same action before some other judge. The proper remedy is to take a position in that action either by way of bill, prohibition, mandamus or something else. Some discussion has been had about a de facto judge. Well, I suppose what is meant by that, and the 280
least that could be said is that he was a judge and that all that could be doubted was as to whether the power that he exercised was lawfully exercised.

Really, if it please the court, I cannot conceive of this court assuming jurisdiction here and overruling the decision of its colleague, or rather, of a temporary colleague, even though unwelcome, as he was at the time, where it has never been done before. If we follow that out to its logical conclusion, wouldn't it be this, and I think somewhere in someone's brief a case is before you where the Supreme Court referred to the time in New York State, happily now past, about which all of us read, and which I think few of us remember when people rushed 2805
around from one judge and then they rushed to another judge and then they rushed somewhere else, all in the same jurisdiction, and I think those were in the days of Jim Fisk and the Erie litigation and so forth, and the Supreme Court, or I mean the United States Supreme Court said that is just the thing that was not done in the federal courts.

What is the nature of this litigation, and who are these people here? I have referred to the fact that, or rather it has been mentioned, that they appeared in another court, or before Judge Manton, themselves. I have men-

tioned the fact that the leading members of the bar in this state have stated and have presented for their clients cases stating that these Receivers were duly appointed.

The Court: That really doesn't mean anything.

Mr. Stryker: What is that, sir?

The Court: It doesn't really mean anything except that they accede to it.

Mr. Stryker: That is what I mean, they acquiesced. In this case I think this has an interesting bearing. I am going to stop discussing this case. I really would like your Honor to have all, as I think you said somewhere, all
2807 the facts and all the sidelights on this case, and I think it might help to understand what is the true nature of this case.

Back in September of this year, rather on August 29th, a bill was filed in this court entitled "Harry Barber v. the Manhattan Railway." The cause was E-71-39. Now, you will see the bearing of this in a minute,—It has only been mentioned, wherein the plaintiff Barber asked that a Receiver be appointed for Manhattan. This was four days after the filing of the American Brake Shoe suit. The Receivers in the American Brake Shoe suit were named as parties defendant in the Barber bill. The at-
2808 torney for Barber was a man named Lawrence Berenson who, I understand, is well known in this court. On that day that the Barber petition was filed, the same day Barber, by his attorney Berenson, filed a petition asking leave to join the Interborough Receivers appointed by Judge Manton as parties in the Barber case, and Judge Manton on that day entered an order directing the defendants in the Barber bill to show cause on September 6th why a Receiver under the petition of Barber sworn to by his attorney should not be appointed for Manhattan.

Now then, here, clearly, and I will pin this home in a moment, clearly this presentation of this petition to Judge Manton was the clearest possible recognition by

the solicitor for the complainant in that case of the jurisdiction of Judge Manton to sit in this case, Rule 1-A or 11-A to the contrary notwithstanding.

The Court: That case doesn't make any motion here.

Mr. Stryker: No, and if you will just bear with me a minute, I think you will see my point.

The Court: Yes.

Mr. Stryker: I haven't made it yet. Just let me put this in. On the return of that motion—then I want you to see what the character of the case is and what kind of good faith we know is in it on the part of these complainants. On that very day Charles Franklin, who is 281
the attorney of record, is he not, in this Johnson case?

The Court: Yes.

Mr. Stryker: Charles Franklin, a member of a committee of Manhattan stockholders known as the Amster Committee, who stated that he was a counsel for some Manhattan stockholders and others, he appeared, and also there appeared representing other stockholders of the Manhattan, Louis Boehm, and this gentleman, Louis Boehm, sits here, and he is of counsel in this bill in the Johnson case, in which they say that Judge Manton broke the law, that he did something illegal. Now, these two gentlemen, at the time when they hoped to get relief 2811
before Judge Manton, came there representing clients in the Barber case, each admitted the jurisdiction of Judge Manton, and in the second paragraph recited, in consonance with his other petitions, that the Receiver for the Interborough had been duly appointed.

Now let's see what that man did, and you will get the real aspect of this litigation and what it is that your Honor is asked to do here. Now then, at the hearing both Franklin and Boehm stated to Judge Manton that it was the condition of Manhattan that caused their bill to be filed.

You asked me where I get these facts. Your Honor

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will find them in the affidavit of Nicolls, I think it is, there.

Mr. Boehm: The affidavit does not so state.

Mr. Stryker: It is in the affidavit that you filed. I beg pardon, it is Franklin and not Boehm.

Mr. Franklin: Mr. Franklin.

Mr. Stryker: Mr. Franklin, yes, pardon me. Now then, let's see; Judge Manton announced that he had already appointed William Roberts, president of Manhattan, as temporary receiver thereof. Thereupon Mr. Franklin, the solicitor in this case, who says Judge Man-
2813 ton acted illegally, appearing before Judge Manton in this matter, thereupon Mr. Franklin urged Judge Manton to appoint Nathan Amster as additional receiver for the Manhattan. Mr. Boehm asked Judge Manton to appoint an additional receiver, Malcolm Sumner. Now you are beginning to see what this case is when the camouflage is torn off, what this case really is. Among other things, Mr. Franklin on that occasion said "We strongly urge that your Honor will consider to make this Receivership —this Receivership—entirely above criticism. That I think would be much more pleasing to all the stockholders, to have someone acting with Mr. Roberts, if only
2814 for the sake of having two Receivers instead of one."

The Court: Was Mr. Roberts the president of the company?

Mr. Stryker: Yes, sir. He had been appointed as Receiver of the Manhattan.

(Continuing reading) "What we are interested in and I want to join in and I would like to present one myself, is to have someone completely independent of the Interborough;" Mr. Boehm stated "I would like to suggest the name of Malcolm Sumner."

Now we see what this issue is about involving jurisdiction. The application for the appointment of an additional Receiver in the Barber suit was filed then with Judge Manton.

Mr. Boehm: Would you read what else I said then?

Mr. Stryker: You can read it; it is there. Whatever is there is before the court. (Reading) Subsequently by stipulation of Berenson as attorney for Barber, the time was extended to October 16th to answer.

What happened? These men who do not deny the necessity for a Receivership, who fully concurred in every way, and who said to Judge Manton, who they now tell you was acting illegally, that all they wanted to do to make this Receivership perfect was just a little thing of appointing Malcolm Sumner and Mr. Amster Receivers, then the Receivership would have been fine, then the jurisdiction would have been all right, then Judge Manton would not have exceeded orders 1-A and 11-A, then they would not be in here claiming a usurpation of power and an illegal act by the Senior Circuit Judge, if they just got their Receivers appointed. So what is paraded as an issue of jurisdiction, presented to you as an interesting constitutional question of the courts, comes down to the sordid question, though heretofore suppressed by them, that they went before Judge Manton, recognizing his jurisdiction, were defeated and on that day, or rather on the 16th of September, went to Judge Caffey and got this ex parte order to show cause.

The Court: That is the way you always get orders.

Mr. Stryker: Wait a minute, your Honor, if you will pardon me and just let me say this. Of course we do, but when I get an order to show cause, I am frank enough to tell what I have done before in the matter, if it is material, and I defy counsel for the complainant to cite anywhere in their papers the facts of the position which they have taken. They do refer to the Barber case. Now, just let me finish. Now, if your Honor, what is really underlying? You have all the legal points, masters of the law have presented them to you. What is it in effect bearing down under this record, under this smooth attack on Judge Manton, under this implied and rather oblique

criticism of one of the finest lawyers and judges that ever lived in this town, Victor Dowling, and suggesting that independent and proper Receivers be appointed? What is the motive of these men? It is the low motive that they want to get someone else appointed, that is all, that is their interest in the jurisdiction of the court.

Just let me say this, and I am through. Now, I don't know just how to say this, but your Honor will understand my attempt to say this as delicately as I can. These gentlemen are clever lawyers, shrewd and wide awake. Having been defeated before Judge Manton, then they
819 decided that they would try something else, and the Amster Committee through Mr. Franklin intervened in this other proceeding, the Amster Committee which represented before Judge Manton that everything would be lovely if only he could get Mr. Sumner and Mr. Amster appointed, in effect it would be fine, and they there recognized the jurisdiction.

The Court: I really don't appreciate these low things at all, Mr. Stryker. It has got nothing to do with it.

Mr. Stryker: I don't want to go on with anything your Honor does not want to hear, but I would like to
820 point out, as an officer of this court, it has not been done, and your Honor, of course, can weigh what you want to, but I would like just, if I might say so, if I were just a friend of the court, and have you understand at least what I think, but if you think I am wrong, that is another thing, but what I think I will ask you to do as bearing on the question, you have got the legal question and all that, but as bearing on the question of whether you will admit what I say is not quite unusual but unprecedented throughout.

I say that it is quite plain that these gentlemen, hearing or feeling or surmising that there possibly might be or thinking that there might be some fever between this

court—I don't mean this judge, I mean this court and Judge Manton, that here would be an excellent opportunity, a very shrewd move to come in here and try to play that up and, as it were, drive a wedge between the two courts and, for their own interests, capitalize it. I say that, in my judgment, is what they are trying to do.

The Court: This court is old enough not to take anything of the sort.

Mr. Stryker: I know you are old enough and wise enough. The only reason I say that is I just want to present it as my theory of this trap that they are trying to lay for you. 282

The Court: What difference does it make on the jurisdictional question what their motives are? I don't see myself.

Mr. Stryker: I will tell you, your Honor. I will try to answer that question. I will answer that question. It makes this difference, that in a question which, certainly, the least that can be said is that it is open to debate, that with a motive of that kind, a desire of that kind, where your Honor might do one thing or the other, I simply mention that your Honor might well consider the real purpose of this case in determining how to decide this case and what particular discretion you will exercise.

As to the jurisdiction, as to the legality of these orders 2823
and as to all these fundamental questions, of course, it hasn't anything to do. I simply present it and I accepted your Honor's statement about wanting every facet, and that at least seems to me to be a facet in the case.

The Court: I did not mean that sort of a facet.

Mr. Hobbs: Before Mr. Stryker sits down, I happen to be one of the unfortunate owners of some of these 6 per cent bonds. Will that gentleman tell me, or tell the Court what the difference is in principle between the action of this gentleman, and his self-appointed com-

mittee, in forming a protective committee and asking us to deposit with them; to protect them from the Court or the Receiver or what? I merely would like to have an answer. I do not think that charges like he has made should be made unless it comes——

The Court: They make no particular impression upon me, because I am not thinking about parties or about counsel, but the case itself; nothing but the case itself, and it is a question of jurisdiction and a question of administration of justice between different Judges and all those things have to be gone into. That is the main
2825 point. Do you want to be heard?

Mr. Sunderland: If your Honor please, I will be very brief. I am a party in the main Interborough suit. As I stated to your Honor the other day, I represent the Interborough 7 per cent. Noteholders' Committee and 5 per cent Bondholders' Committee. The 7 per cent notes came due on September 1st. There are therefore due and unpaid something over $32,000,000 of those notes, and the amount of the bonds is very large.

Now the committees that I represent appear specially for the purpose of calling to your Honor's attention one or two facts that we think are of vital importance. These
2826 notes and bonds, representing in the aggregate by a long way the principal debts on these properties of the Interborough, the holders of which have made tremendous sacrifices in the past—I refer to the readjustment made in 1922,—and we are confronted with a factual situation, and that was the necessity of the protection of a court of equity. That equity court of this circuit took possession, and began to administer this vast property in that proceeding. The integrity of that proceeding on the jurisdictional question has never been attacked until it is attempted to be attacked in this proceeding. Very important rights, property rights of these creditors have been and are being dealt with in that proceeding. Now

the relief asked for in this collateral proceeding is that those orders be vacated, and all I now say to your Honor, and I say it most respectfully, is this: It is a greater question than the rules of this circuit. It is, as you have well said, a jurisdictional question. That question is one that has been dealt with most painstakinginly in behalf of the interests that I represent, and the other interests. Now in attempting to deal with that question necessarily it involves these very substantial property interests. It is our view and it is the view of many of these creditors who have consulted counsel, that this question of jurisdiction was one free from doubt, but whether that is so or not, the fact is that under the statutes this equity court took possession of our property and is administering it, and, to go back to a time, as has been suggested, if this question of jurisdiction results in anything it results in the vacating of these orders, it puts our interests in jeopardy, the superior interests of creditors as against the claims of a stockholder of one of the companies—not of the main company,—and the effect, I submit respectfully to you, of any action in a collateral attack of this kind is very great on the substantial interests of these creditors, and, therefore, your Honor, I respectfully request that this application be dismissed.

Mr. McCollom: If the Court please, I represent the Trustee under the Manhattan Railway Consolidated Mortgage, and inasmuch as Manhattan interests have not been heard from I should like to state, as briefly as I may, a summary of the position which we take on this application. I have not appeared, but I will ask your Honor's permission to have the trustee of the Consolidated Mortgage appear specially for the purpose of setting up the reason why it thinks this bill of complaint should be dismissed.

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The Court: Are you interested in any way whatever in the other case?

Mr. McCollom: We are a party defendant by intervention in the Interborough suit.

The Court: I have held that parties that appeared in the other case can appear in this matter.

Mr. McCollom: I do not want to appear generally in this case.

The Court: You are not appearing in the sense that you are a party to the suit?

Mr. McCollom: Under the Consolidated Mortgage
331 there are outstanding over $40,000,000 of bonds which have been in default as to principal and interest. Under the Johnson bill it is stated that it is necessary for the Court to take the action requested in order to protect the Manhattan interests. We say that it is entirely unnecessary to attempt to protect Manhattan interests by an improper and defective method; that they can be properly and perfectly protected in a proper way. We say also that the main question which has been argued here today, that is, the ultimate question of the power of Judge Manton to act, is not necessarily for a decision in this case. If this Court will first determine, what we
332 believe to be the settled law, that his acts were at least *de facto*, and can be continued in this case——

The Court: As I say, that is the most interesting question to me; the *locus standi* of these gentlemen for a collateral attack.

Mr. McCollom: It is just a little different way of putting it, Judge. If this Court is of the opinion that Judge Manton's acts are *de facto* and cannot be attacked in this way, then the question of what power he had or did not have is not before the Court for decision.

The Court: The first thing to determine is whether the people who are moving parties here can properly be

heard on the subject which is their objective. If they cannot be properly heard on that subject, that is the end of it, and if they can be properly heard on that subject, you have to determine what the end of their objective is.

Mr. McCollom: They are seeking to be heard in reference to the acts of a *de facto* judge, one as to whom there could be no possible dispute. He was acting at least *de facto,* whether *de jure* or not. And it is equally plain that the acts of the receivers, the receivers being the arm of the court, are equally *de facto* acts as are the acts of the *de facto* judge, except that the acts of the judges can be attacked by a direct proceeding. 28

Now we say where the court, acting at least under the color of authority, which was the language used in the McDowell case in the United States Supreme Court, has taken possession of the property of the corporation, whether it be an enormous traction system of this kind, or other property, that the rights of bondholders and other persons interested may require immediate protection. They cannot be required to guess, at their peril whether the court which has taken possession of the property is acting within its powers, provided, of course, that the requisite diversity of citizenship, and other jurisdictional facts appear, as do clearly appear in this case. 283

Now under the same circumstances, if all the Judges of the same court were not to recognize that a judge acting at least *de facto* for that court is beyond attack while he is acting *de facto,* the situation would be worse than in the old railroad case—I think it was the case of the Wabash, where a railroad line ran through several circuits and the different judges in the different circuits appointed different receivers, except in the present case our situation would be even more unfortunate, because in the Wabash case at least a person needing the protection of the court knew what judge to go to but in this

case if the *de facto* acts are not recognized, then no one would know to whom to apply.

To illustrate, your Honor: On Monday of this week Judge Manton directed the entry of an order providing that the Interborough receivers should pay the interest due October 1st on the Manhattan bonds, and the taxes, subject to ascertainment of the receiver's cash position. Now this direction was made upon the united application of the Manhattan receiver, the trustee under the Consolidated Mortgage, and the committee of the bonds secured by that mortgage. As October 1st approached, which was
2837 the date upon which that interest was to become due, the only means of payment was in the possession of the Interborough receivers appointed by Judge Manton. Under Equity Rule 4 of this Court it is provided that the Judge who appoints the receiver shall retain supervision of the cause. Now can anyone be heard for a moment to say that the mortgage trustee must fail in his duty to the bondholders by making no application for the payment of interest and taxes until the authority of Judge Manton to act shall have been finally determined and finally after months of delay find that having applied for and obtained his direction for payment of taxes and in-
2838 terest they cannot rely on that direction.

Therefore the trustee under the Consolidated Mortgage takes no position whatever before this Court upon the question of whether Judge Manton had the full power or did not have the full power to do what he did. On the other hand, it is our duty to assert, and we do assert with all the strength of which we are capable, that there cannot be any question that what he did was at least as a de facto judge, and that his acts are beyond attack in this proceeding. We say that so far as the appointment of the Interborough receivers is concerned in the Interborough suit, that no bill filed by a stockholder of Manhattan could possibly reach the appoint-

ment of Interborough receivers in a different suit. That has been discussed——

The Court: Mr. Boehm is an Interborough security holder according to his affidavit here. Is that right?

Mr. Boehm: Yes, your Honor, holding $95,000 of bonds.

Mr. McCollom: There is no authority whatever, Judge, which would support any such position, nor is there any authority which would support the right of a stockholder, by a stockholder's bill of the Manhattan, to attack the appointment of the Manhattan receiver made in the Interborough case. 284(

Your Honor asked, and I think your question was answered, as to what his remedy was. In the order appointing the temporary receivers of the Interborough and subsequently in the order appointing the temporary receiver of Manhattan, there was a provision that all parties in interest, and all other persons, should show cause on the 22nd of September, why the receivership should not be denied. Now the remedy of these complainants was to appear at that time, appear specially for the purpose of setting out their reasons why the receivership should not be made permanent. They failed to do so, but they had an adequtae remedy. 2841

The Johnson bill before your Honor is not even an adequate bill upon which the receiver could be appointed, even if there were not already a receiver appointed by Judge Manton. It does not comply with equity rule 27, not only in the respect in which Mr. Tuttle spoke, but also in respect of the requirement that it must allege with particularity the efforts made to secure action by the directors or excuse the failure to do so. It shows nothing on those lines when it is analyzed.

Now finally, your Honor, I wish to say only this: I most respectfully suggest that the bill of complaint should be dismissed, and the matter ended in that way,

and whatever disposition this Court may make of the bill, I believe that the decision of this Court should clearly hold that Judge Manton has been acting at least as a de facto judge, leaving for future determination in a proper proceeding the question whether he has been acting de jure, and that you should hold that all action which has been or shall be taken by him or by his receivers, until it shall have been finally and duly determined that he has no power to act, is beyond attack on the ground of lack of power. The reason I make that suggestion is that if your Honor should decide not to
2843 dismiss the bill, but should grant relief under the bill, I think by the same order it should be made perfectly clear that the action which may be taken until there is a final determination of Judge Manton's power or lack of power to act,—it should be made clear that any such action is final action upon which the parties may rely.

The Court: Why, certainly. You mean having a provision that *ad interim* the case, until final disposition, all the orders and payments and so forth as made by the receiver should be confirmed as correct, so that you start out with a regularization or affirmance of everything that had been done by you, or up to the point of having other
2844 receivers, is that what you mean?

Mr. McCollom: Yes.

The Court: Why, of course, something of that sort would have to be done, naturally.

Mr. McCollom: But I most respectfully request, your Honor, that the bill of complaint be dismissed as utterly inadequate, the plaintiffs having no standing to seek the relief they ask.

The Court: Have you any cases on that?

Mr. Tuttle: Mr. Guthrie and I would appreciate it very much if Mr. McCollom would put them in some form.

The Court: I would like it if he has any authorities. He can send it to the other people if he wishes.

Mr. Stryker: Would your Honor permit me to file, as soon as I can prepare it, an additional memorandum on the question that has been mentioned so often as to the *locus standi*?

The Court: That is what I am most interested in.

Mr. Stryker: May I have that privilege?

The Court: I will let you do it up until tomorrow night. I am going to try to work on this over the week-end.

Mr. Stryker: I will try to get it done.

Mr. Tuttle: I would like to have the same privilege, because apparently some material I have sent in for the printed brief which I thought was in, apparently has been left out.

The Court: Do not make it in elaborate form. I will do better than that for you. You can send them to the Bar Association on Saturday morning; to the doorman of the Bar Association.

Mr. Tuttle: What hour?

The Court: Say twelve o'clock Saturday morning. No, I will have to be down here to sign orders. You had better send them to Chambers. Saturday morning at ten-thirty.

Mr. Hobbs: If your Honor please, I have a word to say, representing those who are not represented by committees and those who have all the securities except the 7 per cent. notes. It is the first time we have heard from these gentlemen who have brought on this receivership. They did not utter a word before Judge Manton that I could hear, and I think I was the only one who appeared claiming that the receivership was not only unnecessary but was brought about overnight without any notice to the interested parties, but with the consent of all of the officers of the company, only a few days before the an-

nual meeting of the shareholders and on a complaint, I was about to say, the flimsiness of which, if taken *pro confesso,* as they did take it, in other businesses, you could put three-quarters of the now running big businesses in receivership overnight.

The Court: Well, they have to consent.

Mr. Hobbs: I beg your pardon?

The Court: They would have to consent.

Mr. Hobbs: They did consent.

The Court: But you could not put businesses into receivership unless they consented.

Mr. Hobbs: No, I say but they did consent. That is the point. I mean the concern itself did consent without consulting the shareholders and they make it on this ground. I have yet to hear one word here—they went the roundabout way, as Mr. Guthrie said. These gentlemen have to pick a judge about which there was some doubt as to his jurisdiction, and there was no doubt about Judge Patterson's jurisdiction, and the proper party to bring it before in the regular order of business. And in making the point or comment about the rule, that you cannot cut down the jurisdiction or the authority of the presiding judge of the circuit court, the converse is also true. That was limited to special jurisdiction anyway. Neither can the presiding judge of the Circuit Court curtail, take away from, or cut down the jurisdiction of the eight Judges of the District Court. And, carried to its logical conclusion it is this: that the Judges of the District Court, duly created by law can if the presiding justice is to take it by *pro confesso,* decide in all cases and leave you nothing to do, notwithstanding the rules promulgated for the regulation of business and the conduct of cases, and assuming always that the Court has jurisdiction. Not one word has been said here why they went a roundabout way——

The Court: I know, but I am not inquiring into that.

Mr. Hobbs: I know, but then as to the jurisdiction, certainly the District Court has jurisdiction. And why an ex parte proceeding, which is what this was after it is taken *pro confesso* can go against the rules formulated in such cases and take a judge of their own picking, not in the regular course of the jurisdiction is hard to understand. Therefore, if Judge Manton did exceed his jurisdiction in cutting down the jurisdiction of the District Court, what is our remedy?

I appeared there, not agreeing with any of these gentlemen, but trying to show the Court that a receivership 28
was unnecessary; that no demand had ever been made on any of these holders, either the 6 per cent. or 7 per cent. holders or requests to extend the time. We would all have been glad to. And to come before a court of equity and to spend, as I have all day today listening to them denouncing and throwing suspicion upon the proceedings brought before this Court, that they should have come with some explanation of why they avoided this court. Therefore I think the question as to whether the receivers are competent, or the collateral questions of the court's jurisdiction, and whether it was a proper case in which to take the special proceeding, or to take the special action that has been authorized by the rules 285
of the Court in limited or special cases.

Now they gave some reason. What is it? That the Court may appoint a trust company, the Irving Trust Company. As a matter of fact I know of no rule and the Court does not always appoint the trust company in equity actions.

The Court: There is no such rule. There is not even such a custom.

Mr. Hobbs: Then they make the further point, that unless they do this—I do not know whether they mean to go before Judge Manton, or continue this overnight pro-

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ceeding, or some security holder may bring suit, but they say, therefore, it was in the interest of unification and continuity of the property to have this receivership, whereas in the next breath they say that they want to get rid of the Manhattan properties and it is not in the interest of unification. I won't say what I think the interest is, because it is a question of jurisdiction now. Therefore it is left all up in the air as to whether we are bound to come before the District Court, or whether in any event we can ignore the rules that Mr. Guthrie said should be ignored.

2855 The Court: He said they were not rules.

Mr. Hobbs: I beg your pardon?

The Court: He did not say the rules should be ignored, but he said they were improperly passed rules and, therefore, ignore them.

Mr. Hobbs: Improperly passed rules? I do not know. I know of a number of State Court cases where, in cases a little different, an order to show cause comes before a Judge ex parte, and the Judge does not know, and cannot know what the merits are, but if, on the other hand the defendant falls over himself and says, "Yes, we will come along and *pro confesso,* consent to the jurisdic-

2856 tion," and nobody objects, why, just as any of us could become judges in some special case, if somebody consents to it, but in no case—now this is a case—I do not know any like it, and in every case cited, I think it can be shown that the jurisdiction of the Court, *ab initio* was never challenged as it is challenged here, and if their inescapable conclusions that they mention are a fact, then your rules can be abrogated and they are useless. The rules I suppose are to be made in compliance with statute and the Constitution. This judge's order—it is the district court or the circuit court,—and if the presiding justice of the circuit court has all the powers that Mr. Guthrie, much to my amazement states today, then we have no remedy. I do not know.

My motion to intervene there especially to show in that case there should be no receivership was overruled, and then this proceeding was brought on and I have come in both cases ready to show that if we had, or they would have consented, the receiver should have acted only temporarily until some plan was agreed on; to show there was no necessity for receivership at all.

Now, then, the jurisdiction is challenged, and I think it is properly challenged, and I defy Mr. Guthrie, leader of the bar as he is shown to have been by the gentlemen associated with him, to show any case where from the beginning a rule of the Federal Court had been avoided 285
and the regular court's jurisdictional course was avoided, and they want them to take advantage of another rule whereby in certain cases the presiding justice of the circuit court could appoint somebody else and particularly when he appoints himself. It means to me a *reductio ad absurdum,* to get back at the other side. Is this a collateral proceeding? Where should that jurisdiction be challenged? Shall we say to the court you have not any right to sit there and have not any right to sit on this case, and make some charge of what I do not know? There are many things the judges do not do quite as we want them, but we never think of impeaching them for it. 2859
What is our remedy?

The Court: I know, but they say, I suppose, that you have to find that out for yourself. They say this is a collateral remedy.

Mr. Hobbs: As I say in a court of equity, if the jurisdiction is challenged, why should it be challenged? They could appeal, I guess, but all of these gentlemen except myself, said, "Yes, the company is insolvent and a receivership is necessary." I say no. It is not insolvent.

The Court: I know. I am not dealing with the question of receivership now.

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Mr. Hobbs: Then to get down to this one point, if your Honor please: Is it not incumbent upon them to show that the district court, for some reason, incompetence or something else, were not the proper parties, or the judge sitting there, to hear this case, and then they go up to a judge of the circuit court. Isn't it incumbent upon them to show that something more than they allege in these flimsy affidavits was necessary for a receivership? I ought to sue the Brake Shoe & Foundry Company for bringing on such an action, except they committed us to it by *pro confesso.* If this is not the proper court to
2861 challenge a thing like that—I tried to get the Bar Association one time—I would like to find out what would be a proper case?

The Court: They do not have to suggest it themselves. These other gentlemen are supposed to argue that *locus standi* question.

Mr. Hobbs: How is that?

The Court: I suppose your side will argue this *locus standi* question; this question of the right to make this collateral attack. It is always the first question to consider.

Mr. Hobbs: I do not want to make an attack. I am
2862 not making an attack. I think the Court was either—I won't say blind,—was misrepresented. For instance——

The Court: I do not want to hear about those things. What I want to hear is pure questions of law. Is there any reason why these people can, or why they cannot, maintain this attack on the jurisdiction of the court in the appointment of those receivers. That is the only question.

Mr. Hobbs: I think this is the proper place to attack jurisdiction.

The Court: All right. What I want to get is some authorities. I want some authorities on the subject.

Mr. Hobbs: Well, I do not know any authority or any case just like this.

The Court: All right. Then in principle.

Mr. Hobbs: Except in the Metropolitan Securities case when Mr. Guthrie knows what Mr. Choate said to him and his clients in that case. I do not think there is any case that exactly fits this situation and, therefore, I think it is time to make some law on it even if we have to have a committee of Congress investigate the whole thing and see what changes should be made in the law.

Mr. Franklin: If the Court please, may I have a few minutes to reply? 28(

The Court: Oh, absolutely.

Mr. Franklin: If the Court please, as I started the argument this morning, I intended to go into a number of matters which I thought were material since they came within the purview of the case. They were in support of allegations set forth in the original bill and in the supplemental bill. Your Honor stated that you were only interested in the jurisdictional points, and I then said that that would considerably shorten my argument, and I said nothing about it.

My friends on the other side, however, have taken the liberty of referring to me and to my name, and to the case, and I ask that before giving just the cases your Honor needs in order to decide this case in our favor, the personal privilege of stating certain facts. First I want to say that I have been admitted to this Bar since 1903, and I have handled over seventeen hundred cases, and I have never had a lawyer,—I do not know what this gentleman's name is or who he is, but that was the most dastardly attack that a man could make on a brother lawyer without knowing him or without knowing the facts; perfectly shameless. 286

Now I want to say this, if the Court please: that for 20 years I have been a stockholder of the Manhattan

Railway Company, and that I have got over $200,000 invested in it myself. It is true it is not worth much today, but the reason for that is very obvious. The I. R. T. itself is nothing but a stepchild of the B. M. T.; and the Manhattan relationship is much further removed than even the I. R. T. It cannot be classed even as a stepchild, and the very purpose of this proceeding, as admitted by Mr. Clark and others was to take this empty shell, this empty shell they have reduced it to, and to wipe out that Manhattan stock.

867 Now that gentleman, whatever his name is, made the statement that these committees and these important banking houses had approved the action of Judge Manton. Well, that may be so, but I want to add that their approval of this whole thing won't support a court, and I am ready to prove it.

And I also want to say, and I think this is important, that three people have come to my office, and one at least a prominent lawyer, and asked me to drop this case. I further want to say, if the Court please, that I am representing here, as I stated in my argument this morning, more than 100,000 shares of Manhattan stock, including the Brookin corporation, and a few individual stock-

868 holders that have deposited their stock in the Amster Committee.

I do not like to mention the name Amster, but so long as it has been mentioned I simply call to your Honor's attention that for more than ten years he was chairman of the executive committee of the Rock Island, in one of the most successful reorganizations that this country has ever known, and that he served during that ten years as chairman of the executive committee without compensation; that he did the same regular court service in the Boston & Maine transaction, and, in addition to that, three years ago he had absolute control of Manhattan Railway Company by proxies. He was told

he could elect the entire board of directors, and he refused to do it, but stated that he only wanted fair play for those who had invested their moneys in this company, and it was he that put Charles Hayden on the board, his friend Charles Hayden and E. N. Brown.

The Court: Now——

Mr. Franklin: I am not going to go into this. Your Honor asked me not to go into personalities. They do not belong in this case.

The Court: I do not think so at all.

Mr. Franklin: I thoroughly agree with you, but when a lawyer gets up and tries to associate me with improper 287
motives and things of that kind, when a lawyer has been practicing in this court for almost thirty years with some of the leaders of the bar, because the men I have been associated with for those thirty years have been leaders of the bar, men who were associates with Mr. Guthrie, and, in fact I should say if Mr. Guthrie was in my place, and arguing for my side, I do not think there would be much opposition. I think his great learning and standing would have convinced this court long ago that our case is meritorious.

Now I want also to call to your Honor's attention, coming down now to civil statements: Your Honor may 287
have noticed,—I did not mean to interrupt,—that while one of counsel from the other side were reading this morning, referring to my bill, I got up and complained because he was not reading from my bill. He was reading from a bill filed by Mr. Boehm; with regard to the failure to comply with rule 27. First I want to call to your Honor's attention that in paragraph 24 B of the original bill,—one is marked original and one supplemental bill. I shall read this rapidly because I will give your Honor the cases under the point.

The Court: Paragraph what?

Mr. Franklin: Paragraph 24 B: (Reading):

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> "Upon information and belief, as several of the directors of Interborough and also directors of Manhattan, and as heretofore alleged, three of the directors of Interborough constitute three of the four members of the Executive Committee of Manhattan; that the interests of these directors are conflicting, and that it is impossible for such directors, particularly those controlling the Executive Committee of Manhattan to act independently and adequately and fully to protect the rights of Manhattan as against Interborough when
2873 acting in such dual position; that various questions of the rights of Interborough and Manhattan must necessarily arise, particularly as to operating and maintenance costs and revenues in connection with the operation" of the line.

Then in our supplemental brief,—I am very glad I thought of the supplemental brief, if your Honor please, because I think it covers adequately almost every question that the other side mentioned and gives other Federal or Supreme Court authorities and, I think, one case which is a New York Court of Appeals authority.

2874 Now on that rule, in my main brief at page 38,—that is the page which I personally signed, I point out four separate cases:

> *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.*, 215 U. S. 435;
>
> *American Creosote Works Inc. et al.* v. *Powell*, 298 Fed. 417 (C. C. A., 5th Circuit);
>
> *Ogden et al.* v. *Gilt Edge Conc. Mines Co.*, 225 Fed. 723;
>
> *Whittaker* v. *Brietson Mfg. Co.*, 45 Fed. (2nd) 465 (C. C. A., 8th Circuit).

Each of those cases, your Honor will find were where stockholders find that it would be futile to ask the consent of directors to the bringing of an action in this court that they will permit the action to be brought without compliance with that rule. Now a good deal has been said about collateral attack. In that connection I want to read a few lines from the decision of the United States Sppreme Court in the case of *Windsor* vs. *McVeigh*.

The Court: Is that in the brief too?

Mr. Franklin: Yes, that is in the supplemental brief on page 2, where the United States Supreme Court said— first I want to point out that our contention is that Manton was without power to act; that he had no jurisdiction. In all of the cases that were referred to by the other side jurisdiction appears to have been conceded, but even here the Supreme Court says: "Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. * * * So a departure from established modes of procedure will often render the judgment void." 28

Language that is even more appropriate occurs in the case of *Boyer* vs. *Boyer*, in 129 Appellate Division, 647. In that case, a very important case, because it is like this—— 287

The Court: That is a New York State case?

Mr. Franklin: Yes. That is the New York State Appellate Division case, *Boyer* vs. *Boyer*, referred to on page 2 of the supplemental brief. I want to say first that the language I have just quoted from the *McVeigh* case was approved and made much stronger, although I have not quoted from it except to refer to the case, in the case of *United States* vs. *Walker*, where they also rely on Supreme Court authorities. That case is in 109 U. S., 258, at page 277.

In this *Boyer* case the Court said: "Procedure in disregard of these provisions is not a mere irregularity. (Referring to Rule 73). Such procedure is unquestionably void. * * * nor was the rule established for the benefit of the parties to matrimonial actions, but for public good."

Now, I think your Honor should be referred at this point to a case that was of very great interest to lawyers, involving Mr. Justice Ford of the Supreme Court, who objected because he was not assigned to particular parts.

The Court: I remember that.

Mr. Franklin: And that case went to the Appellate Division, and then it went to the Court of Appeals. We have a situation there somewhat analogous to what we find here, and the Court of Appeals said that Mr. Justice Ford when assigned must obey the rules regarding assignments. He could not even attack them. That case was mentioned, and I won't take the time and trouble to go into it. The Court said there:

"The power to distribute the work of the Court among the twenty-eight trial justices of the First Department must of necessity rest somewhere. The object of its exercise is to secure the highest degree of efficiency in the administration of justice and so promote the interest of the public. Upon the justices of the Appellate Division the power of allotment of the work has been conferred by the Constitution and it is their duty to exercise it according to their best judgment."

When we get down to the point that the other side has made so much of, on the point of collateral attack, there are any number of cases and I refer your Honor to a few which say that where the jurisdiction is lacking, or where there is a lack of power to act you can always attack the proceeding in its entirety and collaterally.

I am reading now from the case of *Phebus* vs. *Search*, in 264 Federal, 407, a Circuit Court of Appeals case, Eighth Circuit, where the Court said:

"Judgments of courts, which at the time the judgments were rendered had no jurisdiction to consider or to determine the issues in the respective cases, and w[illegible]e records at such time disclosed such lack of jurisdiction, are absolutely void,"—that is the situation here —"and may be attacked and defeated collaterally."

I am not going to continue with the long list of cases, but I have given you a half dozen cases along that same line showing that a collateral attack is justified.

The Court: My first impression was that the legal nexus between you and your objective was the fact that the Interborough and Manhattan were both made defendants in your bills, were they not? 28

Mr. Franklin: Yes.

The Court: And what you want to do, as security holders, is to have other receivers appointed and the removal of the present ones on the ground that they were appointed without any legal authority.

Mr. Franklin: That is right. It is absolutely necessary. These gentlemen do not know it, but it is for their own good. It is insecure; it is built on quicksand.

The Court: It is what?

Mr. Franklin: It is built on quicksand. It is for their own interest to have it, so if the Court did nothing else here but to validate that proceeding, but to validate the things that have been done, it would be of inestimable value to them, rather than to have this thing come up and decided that way six months or perhaps a couple years hence. 288

If the Court please, your Honor has made certain suggestions, and the other side particularly have thought that we should have appeared before Judge Manton. Well, I did appear. I did not appear as any representative of any of the names that that gentleman referred to, and he had no right to say it. I appeared in behalf of myself, and I was also asked to represent 100,000 shares of stock, and, as I say, I myself owned 3500 shares. I was away. My assistant was away out of the City, but

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they telegraphed me about the filing of the bill entitled Barber against these companies. I knew nothing of him. I understood an order to show cause had been granted. I asked to find out about the proceeding, and I came to court and these facts are alleged in my original bill. The trouble with the other side is that they have not read the papers. That is all referred to on page 15-a of my original bill.

I went there for the purpose of asking Judge Manton, without knowing what he had done, without knowing about these peculiar orders that I do not think can
385 stand, I went there expecting to make some sort of an argument in support of an appointee that I thought, a man whom I hardly knew, Mr. Amster, whom I hardly knew because I had known of his record in the Rock Island matter, in the Boston and Maine matter, and I knew what he did for Manhattan stockholders three years ago, and I intended to make an argument on that order to show cause which was returnable before Judge Manton at ten-thirty in the morning. I got there at ten o'clock to be sure that I would be on time and perhaps learn something about the case that would be of interest. I was told at ten o'clock in the morning that Mr. Roberts
386 was going to be appointed, a half an hour before the return of the order to show cause, and then I found out that there was a meeting of directors of the Manhattan Railway Company called for eleven-fifteen to ratify the action that the Manhattan had taken, and they could not hold the meeting because Mr. Roberts was in court, and he is the president of the Company, and these directors were told, while they were sitting there, "Why, you know Mr. Roberts has been appointed." When ten-thirty came I did file an intervention, not on behalf—let me make this very plain. I did not represent Mr. Johnson in that case and it is very unfair for the other side not to fully explain that to the Court——

The Court: You represented yourself?

Mr. Franklin: I represented myself, and that is really what I was there for. I was asked to represent a Manhattan stockholders' committee but I filed the intervention, and I found that Judge Manton said, "Well, I am not going to take any cognizance of it. There is nothing I am going to do on this Barber bill. I have already decided on a receivership for Manhattan on an intervention filed later by Manhattan. Therefore I am going to take no action in this case of any kind."

I never even prepared a petition in the Brake Shoe case, but I did think my rights would be properly pro- 288
tected if I filed an intervention in the Barber case.

The Court: We are dealing with the question of jurisdiction. Let us deal with that.

Mr. Franklin: Your Honor will find on page 15a, notwithstanding the statement of the other side, a full statement of the facts. This is an equity bill. It was prepared carefully with a view of entire frankness, and I even mention the title of the case and show what was done and show everything about it, but for them to go ahead and make statements of that kind is entirely unworthy.

Now your Honor has made the statement in the course 2889
of the argument that we possibly could not intervene in the I. R. T. case because such an intervention would be insubordination to and in recognition of the propriety of the main proceeding. We could not do that, and when I found Judge Manton disregarded that whole thing and simply threw us out of court,—he never honored the petition of intervention as the other side allege that paper was thrown out,—then I began to look into the thing and my first thought was to intervene in the American Brake Shoe Company case but I was met with Rule 37 of the Equity Rules. I was also met with the decision of United States *against* California Canneries, 247 U. S.

And I was met with other cases, and I could not go and say this Judge had no power and make the attack I make in my bills and my brief and supplementary brief, and I would not have had the record I wanted.

I think your Honor knows, and certainly knew very well, Mr. Maxwell Evarts, and other of my associates for many years. This proceeding is brought with the utmost good faith. It is brought with the utmost sincerity. It is a good bill, and I think it will stand. I have given you the law on the subject and I am not going to go into many more cases. There are a great deal more
2891 that would make these hardened gentlemen blush, as to what did happen, but I am not going to do it.

The Court: I am not interested in that phase of it.

Mr. Franklin: I am not going to do it, but I want your Honor to know that this bill is perfectly able to stand on its own feet, both as to the facts and as to the law, and I most earnestly request your Honor to carefully read our main brief, and our supplemental brief, and the bills as filed. I served copies on the other side.

The Court: You do not suppose I am not going to read the papers in a case like this?

Mr. Franklin: Of course. Particularly the cases. It is not surprising, really, for me to make the suggestion,
2892 because these gentlemen could not have read the papers and they could not have read the briefs.

The Court: The only difference between counsel and the Judge is that counsel has no responsibility and the Judge has all the responsibility.

Mr. Franklin: Yes, I want to say, if the Court please, I personally feel a great sense of gratitude that this case is being submitted to your Honor, because your Honor's fairness and your Honor's large experience long before you came on the bench was such that lawyers everywhere have known of your splendid work and it is right that a case of this importance should be submitted to you for determination.

Mr. Boehm: May it please your Honor, I too have been practicing for many years before this court; for 28 years last February, and this is the first time also that an attack has been made such as has been made by Mr. Stryker upon my good faith and upon my motives, and with such little justification, as in this case.

Of course counsel does not state what his own motives were in making the attack, which was to becloud the issue and to prejudice the Court against the complainant and against myself on this litigation. That, of course, was his obvious purpose, but that he has not mentioned. But so far as my own good faith and motives are concerned, Lillian Boehm, my wife, and I have for a number of years owned securities of both the Manhattan and the Interborough, which today have a par value of $360,000. I wish we did not own them. I think under those conditions I was certainly entitled to represent her and to represent myself upon a proceeding of this kind. Of course I had no notice whatever of the ex parte application that was made in the American Brake Shoe case upon a $27,000 claim for goods sold and delivered, which the Interborough was perfectly well able to pay, because it had $5,000,000 in the bank at that time. I had no knowledge that such an application would be presented ex parte, and that the Interborough would, ex parte, appear before a Judge selected by the parties in advance, as is shown by the orders that have been made here, for the purpose of appointing a receiver or receivers satisfactory to them, and I did not even know of the bill in the Barber case; never knew or heard of Mr. Lawrence Berenson even until, I think, two or three days before the return day of the order to show cause in the Barber bill when a friend of mine who happened to know of that bill told me that such a motion was being made returnable before Judge Manton, and thereupon, in view of the large interests that both Mrs. Boehm and I had, I appeared upon the return of that order to show cause.

I did not inquire into the question of Judge Manton's jurisdiction. I assumed that Judge Manton had jurisdiction; that he would not make an order appointing receivers of a vast property like the Interborough, unless he had jurisdiction; that he would not entertain the bill in the Barber case unless he had jurisdiction, and I took it for granted that he had jurisdiction and we appeared on that assumption, and when we were ushered into Judge Manton's chambers we were calmly told that Judge Manton had already appointed a receiver of the Manhattan Railway Company in another ex parte application made by the Manhattan Railway Company itself, upon an alleged meeting of the Board of Directors, held a day or two previously, which, I understand, was irregular, and they afterwards had a meeting the same day, later on, to ratify what had been done, and he said, "I have already appointed Mr. Roberts, the President of the Manhattan Railway Company, as receiver." Therefore I stated I represented 10,000 shares of stock and about $140,000 of bonds and we were desirous of accomplishing upon this application the appointment of receivers who would be independent of the Interborough interests, because it is my belief, and the belief of others who are familiar with this situation——

The Court: What are you reading from now?

Mr. Boehm: From what happened before Judge Manton. This is a stenographic transcript.

The Court: Is that in here?

Mr. Boehm: That is contained on page 14 of Nichols' affidavit. You have that. (Continuing reading):

"The Court: You have that, the president of the Manhattan.

"Mr. Boehm; Unfortunately, we don't consider him sufficiently independent of the Interborough interests because under his management and under the management of the present board of directors we feel that the interests of the Manhattan have been neglected."

I then went on to tell the Court, or Judge Manton, at least, in what respect their interests were neglected, but the rest of my remarks were deleted and are not contained in this affidavit; that the physical properties were allowed to run down of the Interborough; that no accounting was filed of the moneys due to the Manhattan, or no separate accounts were kept of the income of the Manhattan Railway as separated from the entire elevated division which included unprofitable extensions of the Interborough Rapid Transit Company. Those were the things mentioned to Judge Manton and, of course, no relief was granted. A petition for intervention was presented and 290
never acted upon by Judge Manton.

Now under those circumstances surely a stockholder owning $360,000 of these securities is entitled to take some steps to protect his interests and these are the steps that we have taken here, and the attack which was made by Mr. Stryker is not only untruthful, but it is most unfair and actuated by most unworthy motives.

Now on the question of jurisdiction, which is really the main question, and really the only question before your Honor, I would like to call to your Honor's attention a decision of Judge Lacombe in the case of Pennsylvania Steel Company against the New York City Company in 221 Federal. 2901

The Court: In the brief?

Mr. Boehm: Oh, yes. It is in the brief. Where Judge Lacombe appointed himself to hold a District Court, and in that case he sets forth the history of this particular section of the Judicial Code which Mr. Guthrie has exalted to the skies as something conferring almost divine powers on the Senior Circuit Judge of this Circuit. Here is what Judge Lacombe says in regard to the history:

"This provision for designation of a Circuit Judge was not in the original bill"—that is the original bill in

Congress—"which on its passage constituted the Judicial Code. It was inserted while such bill was under consideration in Congress, on application of the United States Attorney for the Southern District of New York. Attention was called to the fact that, on whatever day the existence of the Circuit Court should terminate——"

The Court: January 1, 1912?

Mr. Boehm (continuing reading): "Whatever day the existence of the Circuit Court should terminate and its business be transferred to the District Court, there would probably be found on the equity side of the court suits which had been in part tried and disposed of by interlocutory decrees or decretal orders before some Circuit Judge, but in which his work had not yet been terminated by final decree. It was suggested that in such cases it would be better, involving less delay, if the Circuit Judge were allowed to finish his incomplete work, rather than to require a District Judge to take up the unfinished cause and familiarize himself with its prior history. It was also suggested that, at least in this District there would sometimes be occasions when the business of the court, increased as it was by old Circuit Court work, part of which had been theretofore done by Circuit Judges, might be so great that the District Judges could not promptly dispose of it, while at the same time some of the Circuit Judges might be able to spare time from the work of the Circuit Court of Appeals. These suggestions apparently commended themselves to Congress, for the bill was amended so as to include the provision above quoted."

That shows plainly what the purpose of Section 23 of the Judicial Code was, namely, to complete unfinished business, and where the business of the Court had become congested, and the Circuit Judges did not have enough work to do, that a Circuit Judge might be assigned to assist the District Court Judges in the disposi-

tion of their work, and it was not put in because Congress thought that the District Court Judges were not competent enough in an important case to pass upon applications for the appointment of receivers. It was put in for the expedition of business, as I said in my original argument.

Of course in the case in which Judge Lacombe wrote this opinion I might say that he designated himself only because he had originally taken jurisdiction of the case as a Circuit Court Judge, when the Circuit Court had jurisdiction of such applications and the reason that he said he continued himself was that it was unfinished business; he was familiar with the case, and he thought that, therefore, he should finish the case which he had begun. Which is an entirely different situation than here where we have an original application made to the Senior Circuit Court Judge, no application having been made to any District Judge. 290

Now it seems to me that our opponents are blowing both hot and cold in this case. In one breath they contend that Judge Manton is sitting as a District Judge, and therefore has a right to disagree with the other District Judges as to distribution of business, and in the next breath they contend he is not sitting as a District Judge; he is sitting as a Circuit Judge. Both contentions cannot be sound, and neither contention, in my opinion, is sound. As a matter of fact if he is sitting as a District Judge, I think Section 731 of the Revised Statutes provides: "The District Courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under Section 730 of this title, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their 290

own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." Now that means the District Court sitting as a court. The Judges of the District Court, of course, constitute the Judges of that court. I personally think that under this rule a majority of the Judges could enact the rules, but that is not material here, because here we have a rule enacted unanimously by the eight Judges of the District Court. Now if he is an acting District Judge he certainly must conform to the rules of the District Court. There cannot be any question about that, because
909 this statute says that the District Court may make those rules.

The Court: Everybody agrees to that, but they claim the rules were not valid.

Mr. Boehm: Invalid for what reason, your Honor?

The Court: Well, I could not quite make out. At least it has not dawned on me.

Mr. Boehm: Now, on the other hand if he is sitting as a Circuit Judge, and he is not a District Judge at all, then we are met with the other statute which says that where the District Judges disagree as to the division of business, then the Circuit Judge may assign or divide
910 the business. Now if he is not a District Judge he cannot disagree with the other Distirct Judges as to the division of business, and if he cannot disagree with the other District Judges as to the division of business he has no power as Circuit Judge to assign the business of the District Court.

The Court: The whole point of the thing is about that Section 23, and that is that the Senior Circuit Judge has not any *locus standi*, to use our old phrase, to come into the thing at all unless there is a disagreement in the District Court, and the normal way for that to be exhibited to the Judge is, as it was in Case against

United States, to have the Judges report a disagreement and have him straighten it out. Of course there might be some situation where the circumstances would be so injurious that before either Judge brought it up he might intervene, but in normal circumstances in normal times or situations of disagreement, the normal method would be for the Judges to submit it to the Senior Circuit Court Judge. I think that is really the point on that assignment of himself in that second order. I do not think he ever got as far as having a right to make that sort of an order at all. That is my point.

Mr. Boehm: That is exactly my point, your Honor. 291

The Court: The first order I have not made up my mind on so clearly, but I am quite convinced that the second order was outside of that line.

Mr. Boehm: Well, the first order I think was invalid for two reasons: in the first place before Judge Manton could act under that statute which provides that if the public interests requires he may designate a Judge to sit in the District Court, there must be some color of public interest.

The Court: I know, Mr. Boehm, but you see the curious situation which differentiates the first order from the second is that in the first order they have a recital of public interest. 291

Mr. Boehm: He goes further, your Honor, in the first order. He actually in the first order designates that he shall hear this case.

The Court: Oh, yes, but he says that owing to some public interest he has to hear this case. Well, now, I should rather gravely doubt, if I may use a phrase which I love because I very seldom doubt about anything, but I should be very doubtful indeed if a District Judge, or anybody, could challenge a recital of that kind. There are certain kinds of recitals that you cannot go behind, and I think it is rather doubtful whether you could chal-

lenge that recital; but, on the other hand when you come to a statement that a disagreement exists in the District Court, why that is a definite question of fact, and I have here before me the allocation of business signed by all of the Judges; the summer business allocation signed by all the Judges in June and filed in this court on June 29, 1932, and it is part of the court records; also the assignment of the Judges for October, 1932 to June, 1933 signed by all the Judges, and filed in this court on June 29 also. Now there you have something that I know about, and I further know that there
915 was no request made to Judge Knox under the Rule 1, and that there was never any application made to Judge Patterson which would be a basis for going to somebody else with regard to the receivership. Those are facts that are right before me, and I have mentioned them just now because I want to put them on this typewritten record so as to have them there when any of us look at it again, and there they are.

So in that second order you have got a situation where the recital is something that we can challenge, because it is something that involves ourselves, and we know about, and, in fact, it is a confession practically that he went down to the District Court, and then the disagree-
916 ment was created by his going down there; whereas my point about his right to go down is that it is only under Section 23 when there is a disagreement that he has a right to go down and make an order such as that which he did make in what we call the second order. That is the whole point of the thing.

Mr. Boehm: Your Honor's opinion, then, is that Judge Manton may have had the power to designate himself to hold a District Court, but that he was then subject to the rules of the District Court and must transact such business as may be assigned to him by the Senior District Judge?

The Court: I won't say that is my opinion, but in arguendo that is what I am saying. I do not know that you could challenge the recital in that first order.

Mr. Boehm: Of course that is the question. Personally I do not think there was any public interest.

The Court: That is your personal opinion. Suppose he had a different opinion of his own?

Mr. Boehm: I mean there must be some facts or some color or basis for that recital.

The Court: I do not know. I have not looked at all these affidavits.

Mr. Boehm: Nothing has been suggested up to this 291
time by counsel which would indicate any public interest.

The Court: I do not know that they have to. I do not see how you could do it. You have to remember there might be occasions when a certain Judge wanted to come down, and he did not want to state anything except public interest. I cannot imagine such a thing, but there might be cases where he wanted to do it with a certain degree of readiness, and I do not know but what that is a bit of judicial administration which you cannot go behind. I am rather inclined to feel that way, but, on the other hand, when you come down to something that is right before us in our own court, a recital like that, then, of course we know that there was not a disagreement. 291

Mr. Boehm: Now, with regard to the rules of the court of the district, and their effect, I would like to call your Honor's attention to the case of Shepard *v.* Adams, in 168 U. S., in which the District Court of Colorado, I think it was, enacted a rule that answers must be filed within ten days. The State Court practice provided that answers might be filed within thirty days. Your Honor, of course, is familiar with the Conformity Act?

The Court: The Conformity Act, yes.

Mr. Boehm: Still the United States Supreme Court held in that case that the District Court, in spite of that

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Conformity Act had the right to make a rule for itself under which answers must be filed within ten days, and that that rule had the force of law, in spite of the Conformity Act, and the Supreme Court there said:

"We think it is sufficiently made to appear by these citations from the statutes that, while it was the purpose of Congress to bring about a general uniformity in Federal and State proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of remedies provided by State legislation, yet that it was also the intention to reach such uniformity largely
2921 through the discretion of the Federal Courts, exercised in the form of general rules, adopted from time to time, and so regulating their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

And then they went on to say:

"We have a right to presume that the discretion of the District Court was legitimately exercised in both adopting and maintaining the rule in question."

Now if the District Court has a right to make rules which are really in violation of the Conformity Act, certainly the District Court has a right to make rules which
2922 are entirely in conformity with the Supreme Court rules and with the statute.

The Court: Well, yes, I think myself that the way this thing boils down and all lawyers usually find at the end of a day like this that it does boil down, that there are two real questions here to determine, and one is the *locus standi* of collateral attack. I think that is the initial thing on your side, and the other thing is, supposing everything were true that you have been arguing about; supposing Judge Manton could have issued that first order appointing himself the District Judge, and after having done that he came down and put the other order in, perhaps to get rid of those rules or had some

ground for redistributing the business and get himself in the Motion Part so he could conform to Rule 11-a,—we will say there was that reason; there was a rationale of some kind for it, of course, and when that was done, and he made this appointment, the question is what the effect of that was; did he have the power to do it although it was an irregular exercise of it? Or did he not have any power at all?

Mr. Boehm. May I interrupt your Honor at this moment?

The Court: Yes.

Mr. Boehm: If he violated the rules of the District Court if he was subject to the rules of the District Court, he could do nothing in violation of those rules; if he is superior to the rules, if by virtue of his office as Circuit Judge one can say he is superior to anything that the District Court may do; that he is a superior being and is in no way bound by the rules of the District Court, then, of course, he had the power to do it.

The Court: This decision in the Galveston suit said that the Circuit Court of Appeals were bound by the rules of the District Court if they, in a sense, involved the litigation before them.

Mr. Boehm: This was in the District Court and not the Circuit Court, and he appointed himself to hold a term of the District Court for the purpose of holding that litigation, and once he steps down and becomes an Acting District Judge, as they themselves have said he becomes one, he becomes an Acting District Judge and he is bound by the rules of the District Court, and those rules have the force of law. If Congress passed that rule it would have no greater effect than if the District Court passed the rule, and if he violates an act of Congress and does something he should not do he is without power. That is not an abuse of power. That is without power. He may not disregard the law. He must

conform to the law. His actions and orders must be under the law and not in violation of the law. That is the crux of the matter, I think.

The Court: I think that is too, and you are right to raise the question collaterally. Of course in consent receivership, I don't know, with intervenors, I can't imagine who could raise the question by appeal.

Mr. Franklin: Your Honor, there wasn't any question before the Court.

The Court: What?

Mr. Franklin: There wasn't any question before the Court.

The Court: I understand. I am not talking about you people now, but I am saying I don't know how the question could be raised.

Mr. Boehm: It cannot be if in the Interborough and the American Brake Shoe case we must be subject or subordinate to the bill.

The Court: And with all the people assembled in that case, there would be nobody to appeal on the question of law here involved.

Mr. Boehm: Exactly. The Interborough Rapid Transit and the banking interests think that they can get together with the American Brake Shoe Company with a $27,000 claim and shut out everybody else, they go to a Judge satisfactory to them and they have receivers appointed and nobody else has anything else to say.

Mr. Tuttle: Well, I would take exception to that.

Mr. Boehm: Well, that is the practical effect.

Mr. Tuttle: No, it is not.

The Court: There is an order to show cause.

Mr. Tuttle: Yes, there was, and these gentlemen wont deny they knew about that order to show cause which was published in the newspapers.

The Court: Oh, yes.

Mr Tuttle: And that gave them an opportunity, which other people did embrace, to appear and come in to object to the receivership.

Mr. Boehm: But the receivers were appointed without notice.

Mr. Tuttle: Whether they were appointed without notice or not, there was the opportunity extended by Judge Manton before he decided, to be heard, as to why there should not be a continuance, and they have all been heard.

The Court: Oh, yes, I know.

Mr. Boehm: But they had no standing, they were 293
merely heard through the courtesy of the Judge, they had no standing in the action and could not take any appeal from his order.

The Court: Well, nobody ever raised this point at all in any way until you gentlemen came in with this separate receiver, this separate bill, did they? You did not raise it and nobody else raised it that you know of.

Mr. Boehm: And now when we come to the situation that we claim he is acting without jurisdiction and has no right and no power to act, ~~it~~ it is not the proper place for us to come, to the Motion Part of the District Court where applications of this kind must be heard. Isn't that 2931
the proper procedure?

The Court: You have to come here first anyway, there is no doubt about that. Of course then I could assign you to any Judge.

Mr. Boehm: Now then, your Honor, as to the right to appoint receivers under this bill, as your Honor has stated, we already have the confession of the defendants, both defendants, that receivers should be appointed, that they are insolvent. It is not the rule, as I understand it, in a case of a public service corporation, that the Court can only appoint receivers upon the confession of the defendant. That may be true with other corporations,

but it is not true with regard to public service corporations. In the case of public service corporations where the public interest is involved, as well as the private interests are involved, the Court, where the corporation is insolvent, where it has defaulted in the payment of its obligations, as the Interborough has, has the right to appoint receivers upon notice to the defendant, and receivers have been appointed in cases of that kind, in the case of the Philadelphia Rapid Transit Company, which is upon our brief. But aside from that, as I have said, this Court will look to the substance and not to the form.
933 In this action we have every party to the American Brake Shoe case included as a party defendant here; every party that was before the Court in the American Brake Shoe case is before the Court in this case. In the Brake Shoe case an answer was filed by the Interborough admitting its insolvency and consenting to the appointment of a receiver. In the same case an answer was filed, or rather a petition was filed for the Manhattan Railway Company, admitting its insolvency and asking for the appointment of receivers. So we have these answers and these confessions right here in this court, they are on file here and your Honor cannot ignore them. They cannot blow hot and blow cold and say well, we admitted it
934 there, but only for the purpose of that case. This court is interested——

The Court: I made that answer myself, didn't I?

Mr. Boehm: Yes.

The Court: What they regarded as an answer.

Mr. Boehm: May I just ask your Honor, we have been served with a lot of affidavits, we had not had a chance to read them, just glanced over them, and we would like to reply to any new matter which is contained in those affidavits.

The Court: I am going to try to do something on this thing on Saturday, the only time I have available. I

have got the motion calendar all day tomorrow. And possibly Sunday and possibly Monday, so you will have to get what you want to get in by Saturday morning.

Mr. Boehm: At what time, your Honor?

The Court: Why, say, about half past—well, say eleven to twelve, something like that.

Mr. Boehm: Yes.

Mr. Tuttle: If the Court please, I just want to point out one consideration. Your Honor has frequently referred to the fact that Mrs. Boehm is an intervenor as aiding perhaps what you call the *locus standi* here.

The Court: In the Interborough only. 293

Mr. Tuttle: Yes. I want to leave this thought with you. She is a resident of New York. So far as she is concerned, there is no diversity of citizenship.

Mr. Boehm: Does not——

Mr. Tuttle: Will the gentleman allow me just to finish my sentence?

The Court: Go on. You won't be interrupted.

Mr. Tuttle: We have taken the position, and we believe it to be thoroughly sound, that so far as that Johnson bill is concerned, it does not establish any jurisdiction in this court whatever, and there is no rule that is more than a handbook rule that where there is an intervention which itself would not give jurisdiction in a bill 2937
which does not establish jurisdiction, that intervention adds nothing to the situation.

The Court: I know, but if the bill has jurisdiction the intervention need not have jurisdiction.

Mr. Franklin: That is right.

Mr. Tuttle: Your Honor will recall our argument on this question of *locus standi*. We say that bill of Johnson's gives no jurisdiction to this situation and therefore the intervention does not apply.

The Court: Of course then you have three questions; first, the validity of that bill.

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Mr. Tuttle: Yes.

The Court: That you want to raise that in the case of the intervention; and the second is the right of collateral attack, isn't that the second one?

Mr. Tuttle: That is one of them.

The Court: And the third one is——

Mr. Tuttle: Is the validity, so far as this hearing is concerned, of the orders made by Judge Manton. Your Honor stated that our position was that these rules, so-called, were invalid. That is not all of our position. Valid or invalid, and we do claim that they are invalid,
2939 but valid or invalid, we also claim that they are not applicable to a Circuit Judge acting under that designation.

Now, your Honor may or may not agree with me, but I want the record straight as to what our position is.

Now I am not sure that I have all the briefs. All I have received is a brief, without any back on it, purporting to be the main brief for Johnson.

The Court: There is a heavy brief.

Mr. Franklin: Do you want a brief with a back on it?

Mr. Tuttle: Please don't play with me. I do want to be sure that I get everything. Has Mr. Boehm a brief?

Mr. Boehm: I haven't as yet.

2940 Mr. Tuttle: I understand. Now may I have a copy of that supplemental brief?

Mr. Stryker: If your Honor please, just before you adjourn, may I read one citation?

The Court: Don't go into any oration.

Mr. Stryker: I am not going to.

The Court: What do you want to say?

Mr. Stryker: I just want to call your Honor's attention in the Barber case to the allegation in paragraph 1 thereof, in Exhibit C before you here, that the defend-

ants Manhattan and Interborough Rapid Transit Company, hereinafter called Interborough, are street railway corporations duly organized under the laws of the State of New York, and are citizens of the State of New York; the aforesaid Victor Dowling and Thomas E. Murray are residents of the State of New York and duly appointed temporary receivers of Interborough by order of the Court on August 26, 1932. Application is hereby made to this Honorable Court to join the said Dowling and Murray as Receivers of Interborough as parties defendant in the above entitled case and for leave to sue Interborough.

The Court: I heard that.

Mr. Stryker: Now I want just a minute, if your Honor please. If your Honor will turn now to page 46 of that exhibit, which is the petition of Mr. Charles Franklin, who is the solicitor for the complainant in this case.

Mr. Franklin: No.

Mr. Stryker: Am I wrong about that?

The Court: Who is solicitor for plaintiff?

Mr. Stryker: Who was solicitor for plaintiff in the Johnson case.

Mr. Franklin: I am the solicitor in that case, of course.

Mr. Stryker: That is what I say.

The Court: What page is it on?

Mr. Stryker: Page 46. At page 47, the third paragraph, about two-thirds down, "I am familiar with the facts contained in the original and supplemental bills in the pending equity receivership for the Manhattan Railway Company, and, upon information and belief, I aver that the facts and allegations therein contained are true as there set forth. Petitioner desires to intervene in said action and become party plaintiffs thereto."

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Mr. Boehm: That is true. That was in August and we did not know anything about it, we knew nothing about the jurisdictional question, and that is why we came here.

Mr. Tuttle: Then we have until some time Saturday morning?

The Court: Saturday morning.

(Hearing closed.)

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## Minutes of Hearing Before Judge Woolsey, October 18, 1932, Re Settlement of Orders.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Before: HON. JOHN M. WOOLSEY, District Judge.

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|---|---|
| BENJAMIN F. JOHNSON, Complainant, *vs.* MANHATTAN RAILWAY COMPANY, et al., Defendants. | E. 71-153. |
| BENJAMIN F. JOHNSON, Complainant, *vs.* MANHATTAN RAILWAY COMPANY, et al., Defendants. | E. 71-153. |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff, *vs.* INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | CONSOLIDATED CAUSE. E. 70-364. |
| IN THE MATTER *of* INTERBOROUGH RAPID TRANSIT COMPANY-MANHATTAN RAILWAY COMPANY Receivership. | |

NEW YORK, October 18, 1932, 2:30 p. m.
(In Chambers.)

APPEARANCES:

CHARLES FRANKLIN, ESQ., Solicitor for Complainant.
LOUIS BOEHM, ESQ., Solicitor and Counsel for Lillian Boehm, intervenor.

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HORNBLOWER, MILLER, MILLER & BOSTON, ESQRS., Solicitors for Receivers of the Interborough Rapid Transit Company;
NATHAN L. MILLER, ESQ.,
CARL M. OWEN, ESQ., and
HAROLD J. GALLAGHER, ESQ., of Counsel.

ROOT, CLARK & BUCKNER, ESQRS., Solicitors for Committee of 6% unsecured notes of the Interborough Rapid Transit Company, of which
2951 Charles Hayden is Claimant;
CLOYD LAPORTE, ESQ., of Counsel.

BREED, ABBOTT & MORGAN, ESQRS., Solicitors for The American Brake Shoe and Foundry Company, Complainant;
CHARLES H. TUTTLE, ESQ., of Counsel.

HUGHES, SCHURMAN & DWIGHT, ESQRS., Solicitors for William Roberts, Receiver of Manhattan Railway Company;
CHARLES E. HUGHES, JR., ESQ., of Counsel.

JAMES L. QUACKENBUSH, ESQ., Solicitor for the Interborough Rapid Transit Company.

2952

ARTHUR J. W. HILLY, ESQ., Corporation Counsel of The City of New York;
F. E. CARSTARPHEN, ESQ.,
EDGAR J. KOHLER, ESQ., and
HARRY HERTZOFF, ESQ., of Counsel.

COTTON, FRANKLIN, WRIGHT & GORDON, ESQRS., Solicitors for Protective Committee of Manhattan Consolidated 4's;
CLIFTON MURPHY, ESQ., and
B. C. WRIGHT, ESQ., of Counsel.

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LAWRENCE BERENSON, ESQ., Solicitor for Complainant in an action entitled Barber vs. Manhattan Elevated R. R. Co., the Interborough Rapid Transit Company and the Receivers of the Interborough Rapid Transit Co.

LOUIS B. WEHLE, ESQ., Solicitor for the Guaranteed Stock Stockholders Committee.

DAVIS, POLK, WARDWELL, GARDINER & REED, ESQRS., Solicitors for the 7% Noteholders' Committee and 5% Bondholders' Committee, both Committees of Interborough Rapid Transit Company securities; 2954

EDWIN S. S. SUNDERLAND, ESQ., of Counsel.

DAVIES, AUERBACH & CORNELL, ESQRS., Solicitors for Central Hanover Bank & Trust Company;
HAROLD C. MCCOLLOM, ESQ., and
MARTIN A. SCHENCK, ESQ., of Counsel.

ELON S. HOBBS, ESQ., Solicitor for Independent Security Holders who have not filed their securities with Protective Committee, but have filed a petition.

MR. FOLLMER, Deputy Clerk of the United States District Court for the Southern District of New York. 2955

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The Court: This is on the settlement of the orders. Under my decision the first order is an order of consolidation of The American Brake Shoe and Foundry Company against Interborough Rapid Transit Company-Manhattan Railway Company, intervenor, Equity No. 70-364, with this cause, Johnson against Manhattan Railway, Equity No. 71-153, under the short caption, In the

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Matter of the Interborough-Manhattan Receivership Proceedings. Has that order been presented for settlement?

Mr. Follmer: I have the order here. It was presented to the Clerk in the Clerk's office.

Mr. Franklin: That has been served on all parties.

The Court: Is there any counter-order on that?

Mr. Tuttle: If your Honor please, there is no counter-order, but we desire to ask your Honor to make two insertions in the order, which we believe to be highly con-
2957 sonant with your Honor's opinion and also consonant with the facts.

In the first place, and in order that I might have it in convenient form, we have written out the suggestion that we would propose for your Honor's consideration. The words, "and on its own initiative" are taken from the opinion (handing papers), and the other words simply record the fact, which otherwise does not appear, that we, of course, oppose the consolidation order. You see, there was no motion for consolidation, and consequently our opposition, up to this point, has not been made a formal matter of record, and we would like to have it
2958 appear as such in the order.

The Court: I do not see the words "on its own initiative". Have you given those particular words? Oh, yes, that is right. I have got it. You are right.

Mr. Boehm: My suggestion would be, if your Honor please, that perhaps the best way to handle that situation would be to insert after the words, "The Court", before the words "It is ordered", "The Court, upon its own motion, being fully advised in the premises, it is ordered, adjudged and decreed", and then, of course, if an appeal is taken from that order, the appeal itself will show that that order was not made with the consent of the defendants.

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Mr. Tuttle: Well, I cannot imagine that there could be objection, effective objection, to including in the order a provision that it was over our objection. We do not wish to have any doubt about that. And the Supreme Court has, in certain cases, been somewhat technical in considering any appeals where the orders that were the subject of the appeal do not recite the exact position of the parties.

Mr. Franklin: Of course there was no objection and could be no objection on the part of the defendants up to the present time, and are not the defendants' rights fully protected by their noting their objection and exception at this time?

The Court: Yes, but of course it has got to be on the record in some way. That is the point that Mr. Tuttle is making. Now just wait a minute. (Examining papers). Wouldn't this do it, by a recital at the beginning of this order of consolidation, if you said, "The Court being fully advised in the premises, on its own initiative and over the objection of the defendants in Equity No. 71-153, and of the complainant in Equity No. 70-364"—the defendants in both those actions. That makes it a little easier.

Mr. Franklin: Yes, that would be satisfactory.

Mr. Tuttle: Will your Honor be good enough to repeat that?

The Court: Yes, I will. Have it read, "The Court, being fully advised in the premises", and then proceed, "on its own initiative and over the objection of the defendants in Equity No. 71-153 and Equity No. 70-364, and of the complainant in Equity No. 70-364", because I think the defendants, if they are defendants in Equity No. 71-153, it would cover the whole thing without——

Mr. Tuttle: (Interrupting) The only suggestion I have with reference to your Honor's language is this:

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as you will see from the next order that is being submitted, there are a number of persons and interests who have been allowed to intervene in the Interborough suit and are not parties defendant in the caption.

The Court: Yes. All right.

Mr. Tuttle: They wish a standing.

The Court: "On its own initiative and over the objection of the defendants in Equity No. 71-153 and of all the parties in Equity No. 70-364."

963 Mr. Wehle: May I say a word on that, your Honor?

The Court: Yes, Mr. Wehle.

Mr. Wehle: Representing the 7% Guaranteed Stock Holders Protective Committee, we do not wish to be on record as objecting to the entry of this order of consolidation.

The Court: Well, now, is that a regular intervenor?

Mr. Wehle: We are intervenors.

Mr. Boehm: Yes, they are a regular intervenor. Wouldn't it be better—after all, Mr. Tuttle can only speak for his own client—wouldn't it be better to mention, just as your Honor originally had it, "over the objection of the defendants in this cause and of the complainant in
964 Equity No. 70-364"; and it seems to me that would amply protect the rights of Mr. Tuttle's clients in this situation.

Mr. Tuttle: Of course, I am not authorized to speak, simply because I am attorney for the complainant, for anybody but the complainant, but I know there are several intervenors, and certain of those intervenors, and, I assumed, all of them, had joined. Now we find that one does not.

Mr. Wehle: If your Honor please, I spoke to counsel for one of the other intervenors only an hour or two ago, and he told me that he had not decided to take any position at all.

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Mr. Tuttle: Well, it is perfectly easy, as all the intervenors are here, to call the roll of those that are known and now here as intervenors, and find out who does and who does not, and we will have a record.

Mr. Boehm: Is that all necessary?

The Court: I do not think it is.

Now, "without protest", I presume that is all right; he maintains his protest—I mean that the parties to that cause and the receivers, who are covered by that, and defendants in this cause, if they object, it does not make any difference whether the intervenors object or not, they have to come along under the equity rule.

Mr. Tuttle: Well, if none of the intervenors who are intervenors, as such, desire at this time and place to make any request of your Honor, of course I am not making any request for them. I understood that they did desire——

The Court: What is the use of cumbering up the record with a lot of recitals like that when, whatever the parties do in the case, the intervenors have to go along with them, under the equity rule. They are subject to all those things, aren't they? They may have intersese, interstitial relations of controversy between one intervenor and the other, and between the defendants and the intervenors, but as to the case generally, they just go along, don't they?

Mr. Tuttle: Well, of course, they were intervenors in the Interborough suit.

The Court: Yes, exactly.

Mr. Tuttle: And they consequently, by that intervention, take the situation of that suit. Now your Honor has consolidated them.

The Court: Yes.

Mr. Tuttle: And that produces a rather novel situation.

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The Court: Quite.

Mr. Tuttle: And consequently I had judged from the desires expressed to me by certain of their counsel, that they should be included in that recital of objection, but if they do not wish to press it, I am not here to press it for them.

Mr. Franklin: May I suggest that your Honor examine 71 of the equity rules, which is intended to simplify this procedure, and we tried to follow that rule, and I think we ought to keep the order as simple as possible. That is a quotation of the rule governing the matter.

The Court: Yes, but you see Mr. Tuttle's point is one that I would not feel that it was appropriate for me to overrule him on. He wants to record objection, you see, and if I enter this order without any objection at all, he says that some higher court might say, "Well, there was no objection to this whatever", and there is no record of any objection.

Mr. Boehm: The point we make is that Mr. Tuttle should not speak for intervenors. They are represented by counsel and they were served.

The Court: He says he was not intending to.

Mr. Tuttle: Mr. Boehm need not make that point at all. That point of order is sustained by myself.

The Court: Mr. Sunderland wants to speak. What is it, Mr. Sunderland?

Mr. Sunderland: In behalf of the intervenors, the 7% Secured Noteholders' Committee, and the 5% Bondholders' Committee and in behalf of the Trustee of the 5% Mortgage which, pursuant to order to show cause in E. 70-364, was made a party, I desire to have the objection of those intervenors, the first two mentioned, and the Trustee as a party, recorded to the entry of an order consolidating that cause with the cause 71-153.

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Mr. McCollom: On behalf of the Central Hanover Bank and Trust Company, as Trustee of the Consolidated Mortgage of the Manhattan Railway Company, which is an intervenor in cause No. E. 70-364, we should like to have our objection noted to the order of consolidation.

The Court: Well, then, you are the only one, Mr. Wehle, your intervenors—your intervenors are the only ones.

Mr. Wehle: Yes, we are intervenors, and we do not take any position.

The Court: What is the title of your concern?

Mr. Wehle: Harold Palmer and others, as a Protective Committee for the Manhattan Railway Company 7% Guaranteed Stock.

The Court: Oh, well, Harold Palmer and others, 7% Guaranteed Stock——

Mr. Wehle: Of Manhattan Railway.

The Court: Harold Palmer, et al., Manhattan Railway Company 7% Guaranteed Stock; is that the way you express it?

Mr. Wehle: Yes; Manhattan Railway Guaranteed Stock.

Mr. Wright: On behalf of the Protective Committee representing the Manhattan Railway Company Consolidated Mortgage 4% Bonds, of which Committee P. S. Earl Smith is Chairman, we would like to be recorded as opposing the entry of the consolidation order.

The Court: Well, you see, I am trying to find out who does not oppose. I am not making a record in the way of everybody that does oppose, I am just going to fix it so that people that do not oppose are down here.

Mr. Wright: I am sorry. I thought you had asked for those who do oppose.

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The Court: Now does this cover the situation as you gentlemen understand it: "The Court, being fully advised in the premises, and on its own initiative, against the objection and protest of the defendants above named and of The American Brake Shoe and Foundry Company, complainant in the second above entitled cause, E. 70-364, and the intervenors in said last mentioned cause, with the exception of Harold Palmer, et al., the Protective Committee of the Manhattan Railway Guaranteed Stock".

Mr. Tutlle: That expresses our thoughts.

The Court: That expresses it? Now, I would not consider for a minute not allowing you to have any basis that you wanted to for challenging my order, so that I think I will have this put in, and let's see how I can do that best.

Mr. Franklin: Put it in as a rider, and we will have it rewritten and submit extra copies.

The Court: Oh, I am going to sign and settle this now.

Mr. Hobbs: If your Honor please, I do not want to sit here and have it understood that those who undertook to intervene in the first suit to object to the proceedings and object to a receivership are objecting to this. We favor consolidation.

The Court: Yes, I know, but I don't want anybody that favors it, I want to find out who objects to it.

Mr. Hobbs: Oh, yes, that is right.

Mr. Carstarphen: If the Court please, representing the Corporation Counsel's Office of the City of New York, I want to make a little statement in regard to this. We appear specially in The American Brake Shoe case and have received copies of orders and so forth. We have been named as a party defendant in the Johnson case. We propose at the proper time to take such action as we

may see fit in that case, but the time has not yet expired in which we may either move to dismiss or do anything else we see fit. We would therefore say that, so far as the consolidation of the two are concerned, we are neither objecting to it nor consenting to it. But we would, so far as the Johnson case is concerned, not care to have, through any appearance that Mr. Tuttle makes, or what anyone else here says seem to bind the City of New York in connection with that, because we propose very properly to file a motion to dismiss as to that action against The City of New York. Our time has not yet expired in which to act. So we would like that any order that is entered would not show anything differently than that, so far as The City of New York is concerned.

The Court: Now I have written in and signed the following, and initialed it at both ends, and indicated where it comes in the decree, so the decree will now read:

"The Court being fully advised in the premises, and on its own initiative, against the objection and protest of the defendants above named and The American Brake Shoe and Foundry Company, complainant in the second above entitled cause, No. E. 70-364, and the intervenors in the said last mentioned cause, with the exception of Harold Palmer, et al. Protective Committee of the Manhattan Railway Guaranteed Stock, it is

"Ordered, adjudged and decreed that the above entitled action". That preserves everybody's rights, I think.

Mr. Kohler: If your Honor please, speaking for The City of New York, the City did not take any part. It was, however, made a party to the Johnson suit.

The Court: Well, you object.

Mr. Kohler: In that recital——

The Court: Over the objection.

*Minutes of Hearing Before Judge Woolsey, October 18, 1932, Re Settlement of Orders.*

Mr. Kohler: We do not object to this order. As a matter of fact, we are going to move to dismiss the complaint against us as not stating a cause of action.

The Court: That is all right.

Mr. Kohler: Your Honor has read it as though we objected to the order of consolidation, but for various reasons we prefer not to have that stated. We are neither opposing nor consenting.

The Court: Well, I will just as leave say that The City of New York, made a party there——

Mr. Kohler: Yes.

The Court: Yes.

Mr. Kohler: Not in The American Brake Shoe case, but in the Johnson case; that is the only case.

The Court: Yes, "The City of New York, defendant in Equity No. 71-153, neither consenting nor opposing".

Mr. Kohler: Precisely.

The Court: All right. Now, that is an insert written in in my handwriting. Now that is fixed.

(Signing order.) All right. Now, Mr. Follmer, Mr. Clerk, will you go over, please, and file this in the Clerk's Office, stamp it filed and note the precise time at which it is filed under the mark of the filing, and sign it yourself and then bring it back to me and we will take up the other order.

(Mr. Follmer takes the order and then leaves the room.)

The Court: If you have copies of the other order I might just be looking at that pendente lite.

Mr. Boehm: Yes, sir (handing copy).

(Further proceedings temporarily suspended pending the return of Mr. Follmer.)

*Minutes of Hearing Before Judge Woolsey, October 18, 1932, Re Settlement of Orders.* 298

The Court: Mr. Follmer, the Clerk, returns with the order of consolidation stamped "Filed, United States District Court, October 18, 1932, at 3.08 P. M."

Now you can submit the order dealing with the rest of the motion. Has that been sent to the Clerk's office?

Mr. Follmer: That has been presented to the Clerk's office (handing to the Court).

The Court: Now, is there any objection to the form of this order?

Mr. Tuttle: In view of the fact, your Honor, that 2984
our objections to this decision and this order appear on the record as full and complete, we have no suggestions as to the particular form which has been proposed.

The Court: (Examining order) The last paragraph of that order does not follow the wording of what I said there, and I do not think it is quite as clear (reading):

"It is ordered and adjudged that the said moving parties seeking appointment of new receivers"—I don't see why you did not follow the wording that I have there.

Mr. Franklin: You mean in reference——

The Court: In the order. 2985

Mr. Boehm: That was inadvertently omitted.

The Court: Well, now, you haven't got this form of the whole thing. You begin by saying "They both are denied without prejudice at the present time". Now that is the way it reads, that last clause. I think you ought to have in the recital "came on to be heard on orders to show cause"—ought you not to have something in there?

Mr. Boehm: I think it is in there, yes.

*Minutes of Hearing Before Judge Woolsey, October 18, 1932, Re Settlement of Orders.*

The Court: Where is it?

Mr. Boehm: At the very beginning, "The case of Benjamin F. Johnson against Manhattan Railway Company came on to be heard at this Term, and was argued by counsel, thereupon consideration——"

Mr. Franklin: That is the order to show cause.

The Court: That is a decretal thing. It came on to be heard on three orders to show cause.

Mr. Boehm: Yes.

The Court: I think that ties it up with the previous thing.

Mr. Franklin: Yes.

The Court. That is all right. And then down below here I have got it so it reads that:

"Ordered, adjudged and decreed that the said motions, insofar as they seek the appointment of new Receivers be and they hereby are denied without prejudice at the present time, but if no appeal is taken within twenty days or if, after the decision on such appeal as may be taken within that time, this order is affirmed, then after the entry of the mandate of the appellate court in this court, a new application for such appointment may be made in pursuance of General Rule IIa of this Court to the Judge who at that time may be assigned to hold the Bankruptcy and Motion Part of the business of this Court; and it is further

"Ordered, adjudged and decreed that insofar as said motions seek to have vacated the orders made and signed on August 25, 1932, by Honorable Martin T. Manton in his capacity as Senior Circuit Judge, be denied for want of jurisdiction", and I sign it, and it is dated New York City, October 18th, 1932, signed at 3.37 p. m. (Signs order.)

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Now, Mr. Clerk, you may file that and note the time of its filing, just as you did in the other case. Have you got the other one with you now?

Mr. Follmer: I have it here.

The Court: All right. And that is so there won't ever be any dispute as to the order of their signing or the time at which they were filed.

Now, Mr. Stenographer, I want to have these records —the other has been filed, the previous hearing—I want to have this filed, please, in court, that we have taken 2990
down today, so that we can have a full record of exactly what has happened.

I think that concludes our meeting.

(Hearing closed.)

2991

2992

## Stipulation re Contents of Transcript of Record.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON, *Complainant,* *against* MANHATTAN RAILWAY COMPANY, *et al.,* *Defendants.* | IN EQUITY E. 71-153 |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, *Complainant,* *against* INTERBOROUGH RAPID TRANSIT COMPANY, *Defendant.* | IN EQUITY E. 70-364 |
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153 |

2993

2994

IT IS HEREBY STIPULATED AND AGREED by and between the solicitors for the appellants and appellees that the transcript of record to be filed in the United States Circuit Court of Appeals for the Second Circuit, pursuant to the appeals heretofore allowed on the order made and entered on September 20, 1932, granting Benjamin F. Johnson leave to file his bill of complaint, and the order

made and entered October 18, 1932, consolidating the above entitled cause In Equity E. 70-364, and the above entitled cause, "Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E. 71-153" into one cause, entitled "In the Matter of the Interborough-Manhattan Receivership Proceedings, In Equity E. 71-153", and from the order made and entered October 18, 1932, vacating and setting aside ~~and every certain~~ order heretofore made by Hon. Martin T. Manton in said cause, In Equity E. 70-364, shall include the following:

With respect to the first above entitled cause:

1. Equity subpoena.
2. Order granting leave to file bill of complaint.
3. Petition for leave to file bill of complaint.
4. Order to show cause of September 21, 1932, on petition of Benjamin F. Johnson.
5. Petition of Benjamin F. Johnson.
6. Bill of complaint.
7. Order granting leave to Lillian Boehm to intervene as party plaintiff.
8. Petition of Lillian Boehm for leave to intervene.
9. Order granting leave to intervene to Manhattan Railway Company's Common Stockholders' Protective Committee.
10. Petition of Manhattan Railway Company's Common Stockholders' Protective Committee for leave to intervene.
11. Petition for contingent intervention by Harold Palmer and others as the Protective Committee for holders of Manhattan Seven Per Cent. Guaranteed Stock.
12. Order to show cause of October 1, 1932, on petition of Benjamin F. Johnson.
13. Petition of Benjamin F. Johnson, verified October 1, 1932.

2998 *Stipulation re Contents of Transcript of Record.*

14. Supplemental bill of complaint of Benjamin F. Johnson.
15. Supplemental subpoena.
16. Supplemental bill of complaint of Lillian Boehm.
17. Order to show cause of October 3, 1932, on petition of Lillian Boehm.
18. Petition of Lillian Boehm.
19. Supplemental petition of Benjamin F. Johnson verified October 5, 1932.
20. Designation order, American Brake Shoe record.
21. Division of business order, American Brake Shoe
2999 record.
22. American Brake Shoe bill of complaint, and date of filing thereof.
23. Interborough answer in American Brake Shoe case.
24. Affidavit of James L. Quackenbush in American Brake Shoe case.
25. Order appointing temporary Receivers—American Brake Shoe case.
26. Order appointing Receivers' counsel—American Brake Shoe case.
27. Receivers' application No. 1—American Brake Shoe case.
3000 28. Affidavit of Receivers' counsel—American Brake Shoe case.
29. Consent and waiver of notice as to appointment of Receivers—American Brake Shoe case.
30. Petition and order granting leave to intervene to Committee for Interborough First and Refunding Mortgage 5% Gold Bonds—American Brake Shoe case.
31. Petition and order granting leave to intervene to Committee for Interborough Rapid Transit Co. Ten Year Secured Convertible 7% Gold Notes—American Brake Shoe case.

32. Petition and order for intervention to Committee for Protection of Holders of Ten Year 6% Gold Notes of Interborough—American Brake Shoe case.
33. Petition of Manhattan Railway Company for extension of receivership—American Brake Shoe case.
34. Order appointing temporary Receiver for Manhattan Railway Co.
35. Notice of Motion for leave to intervene to Committee of Manhattan Seven Per Cent. Guaranteed stock—American Brake Shoe case. 300
36. Proposed order of intervention of Committee for Manhattan Seven Per Cent. Guaranteed Stock—American Brake Shoe case.
37. Motion for leave to intervene of Committee for Manhattan Seven Per Cent. Stock—American Brake Shoe case.
38. Petition for intervention by Committee for Manhattan Seven Per Cent. stock—American Brake Shoe case.
39. Exhibit 1 annexed to petition for intervention by Protective Committee—American Brake Shoe case.
40. Receivers' petition respecting Seven Per Cent. Notes—American Brake Shoe case. 3003
41. Petition and order granting leave to intervene to Committee for Manhattan Railway Co. Consolidated Mortgage Gold 4% Bonds—American Brake Shoe case.
42. Manhattan Railway Co. receivership—affidavit showing action of an approval by Manhattan Board of Directors—American Brake Shoe case.
43. Petition and order authorizing Receivers to number documents and papers—American Brake Shoe case.

004 *Stipulation re Contents of Transcript of Record.*

44. Receivers' application No. 3, September 8, 1932—American Brake Shoe case.
45. Petition and order authorizing Receivers to maintain a printed record of all documents—American Brake Shoe case.
46. Receivers' application No. 4, September 8, 1932—American Brake Shoe case.
47. Petition and order authorizing Receivers to pay expenses for registration and transfer of stock of Interborough Rapid Transit Co.—American Brake Shoe case.

005 48. Receivers' application No. 5, September 8, 1932—American Brake Shoe case.
49. Order deferring payment of State Franchise tax—American Brake Shoe case.
50. Receivers' application No. 6 as to postponement of state franchise tax—American Brake Shoe case.
51. Order appointing counsel for Receiver of Manhattan Railway Co.—American Brake Shoe case.
52. Application No. 1 of Receiver of Manhattan Railway Co. as to appointment of counsel—American Brake Shoe Case.
53. Affidavit by counsel for Receiver of Manhattan Railway Co.—American Brake Shoe case.

006 54. Order appointing tort creditors' committee—American Brake Shoe case.
55. Amendment of order appointing tort Creditors' Committee—American Brake Shoe case.
56. Order granting Central Hanover Bank & Trust Co. leave to intervene—American Brake Shoe case.
57. Petition of Central Hanover Bank & Trust Co. for leave to intervene—American Brake Shoe case.
58. Application of publication of notice to creditors—American Brake Shoe case.

59. Substituted petition for intervention by Protective Committee for Seven Per Cent. Stock of Manhattan Railway Co.—American Brake Shoe case.
60. Notice of filing amended and substituted petition for intervention on behalf of Protective Committee for Seven Per Cent. Guaranteed Stock of Manhattan Railway Co.—American Brake Shoe case.
61. Petition for intervention of Elon S. Hobbs—American Brake Shoe case.
62. Receivers' application No. 9—American Brake Shoe case.
63. Order making Guaranty Trust Co. a party— 3008
American Brake Shoe case.
64. Order authorizing Receivers to employ court reporters—American Brake Shoe case.
65. Receivers' application No. 7—American Brake Shoe case.
66. Waiver and consent—American Brake Shoe case.
67. Notice of motion for order respecting Sinking Fund moneys—American Brake Shoe case.
68. Receivers' application No. 8—American Brake Shoe case.
68-a. Order respecting Sinking Fund moneys—American Brake Shoe case.
69. Notice by Receiver of Manhattan Railway Co. of 3009
application for order re interest due on First Mortgage Bonds of Manhattan Company—American Brake Shoe case.
70. Petition of Receiver of Manhattan Railway Co. for order for payment of interest on First Mortgage Bonds of Manhattan and for payment of taxes—American Brake Shoe case.
71. Answer of Committee for Interborough Rapid Transit Co. Ten Year 6% Gold Notes to petition by Receiver of Manhattan Railway Co.—American Brake Shoe case.

3010 *Stipulation re Contents of Transcript of Record.*

72. Answer of Committee for Interborough Rapid Transit Co. Ten Year 6% Gold Notes to Receivers' petition for instructions—American Brake Shoe Case.
73. Answer of Guaranty Trust Co. to petition of Manhattan Receiver—American Brake Shoe case.
73-a. Answer of Guaranty Trust Co. to petition of Interborough Receivers—American Brake Shoe case.
74. Answer of Committee representing Interborough Ten Year Convertible 5% Gold Bonds to petition of Manhattan Receiver—American Brake Shoe
3011 case.
75. Answer of Committee representing Interborough 5% Gold Bonds to petition of Interborough Receivers—American Brake Shoe case.
76. Answer of Committee representing Interborough Ten Year Secured Convertible 7% Gold Notes to petition of Interborough Receivers—American Brake Shoe case.
77. Notice of appearance on behalf of Guaranty Trust Company of New York, as Trustee—American Brake Shoe case.
78. Order continuing receivership—American Brake Shoe case.
3012
79. Order granting leave to intervene to Protective Committee for Seven Per Cent. stock of Manhattan Railway Co.—American Brake Shoe case.
80. Order granting leave to Central Hanover Bank and Trust Co. to make Receivers parties defendant to bill of complaint—American Brake Shoe case.
81. Petition of Central Hanover Bank and Trust Co. to make Receivers parties defendant to bill of complaint—American Brake Shoe case.
82. Answer of Receiver of Manhattan Railway Company to petition of Receivers of Interborough—American Brake Shoe case.

83. Answer of American Brake Shoe and Foundry Company to petition of Interborough Receivers—American Brake Shoe case.
84. Answer of American Brake Shoe and Foundry Company to petition of Receiver of Manhattan Railway Company—American Brake Shoe case.
85. Notice of motion and petition of Central Hanover Bank and Trust Company, as Trustee, for payment of taxes and interest.—American Brake Shoe case.
86. Petition of Central Hanover Bank and Trust Co. as Trustee for payment of taxes and interest— 301
American Brake Shoe case.
87. Exhibit A annexed to petition—bill of complaint —American Brake Shoe case.
88. Bond of William Roberts, Receiver of Manhattan Railway Co.—American Brake Shoe case.
89. Bond of Thomas E. Murray, Jr., Receiver of Interborough—American Brake Shoe case.
90. Bond of Victor J. Dowling, Receiver of Interborough—American Brake Shoe case.
91. Affidavit of Victor J. Dowling—American Brake Shoe case.
92. Affidavit of publication of notice to creditors of Manhattan Railway Co.—American Brake Shoe 301
case.
93. Notice of motion by Protective Committee for Seven Per Cent. stock of Manhattan Railway Company re Receivers' application No. 9—American Brake Shoe case.
94. Motion of Protective Committee for Manhattan Railway Co. Seven Per Cent. Guaranteed stock relating to proposed instructions to Receivers on application No. 9—American Brake Shoe case.
95. Proposed order as to Seven Per Cent. stock of Manhattan Company in relation to Receivers' application No. 9. American Brake Shoe case.

*Stipulation re Contents of Transcript of Record.*

96. Answer of Interborough Receivers to petition of William Roberts, Receiver of Manhattan. American Brake Shoe case.
97. Supplemental petition of Receivers to application No. 9. American Brake Shoe case.
98. Affidavit of H. M. Fisher and sheets annexed thereto. American Brake Shoe case.
99. Opinion on petition of Interborough Receivers and Manhattan Receiver, re payment of past due taxes, interest on Manhattan bonds. American Brake Shoe case.
100. Answer of Central Hanover Bank and Trust Company to petition of Interborough Receivers of September 28, 1932. American Brake Shoe case.
101. Petition of Chadbourne, Stanchfield & Levy to terminate their employment as counsel for Interborough Receivers. American Brake Shoe case.
102. Order terminating employment of Chadbourne, Stanchfield & Levy, as solicitors for Interborough Receivers. American Brake Shoe case.
103. Order appointing Hornblower, Miller, Miller & Boston, solicitors for Interborough Receivers. American Brake Shoe case.
104. Affidavit of Nathan L. Miller. American Brake Shoe case.
105. Affidavit of J. Osgood Nichols, verified October 5, 1932.
106. Exhibit A annexed to the affidavit of J. Osgood Nichols of October 5, 1932. (Not to be printed twice.)
107. Exhibit B annexed to the affidavit of J. Osgood Nichols of October 5, 1932. (Not to be printed twice.)
108. Exhibit C annexed to the affidavit of J. Osgood Nichols of October 5, 1932, consisting of bill of complaint and certain orders obtained by and on behalf of complainant in the Barber case. (The same not to be printed twice.)

*Stipulation re Contents of Transcript of Record.* 301

109. Affidavit of Martin A. Leach, verified October 5, 1932.
110. Affidavit of William Roberts, verified October 6, 1932.
111. Affidavit of William Roberts, verified October 8, 1932.
112. Affidavit of Charles Franklin, verified October 8, 1932.
113. Affidavit of Louis Boehm, verified October 8, 1932.
114. Stipulation extending Interborough Receivers' time to answer.
115. Stipulation extending Manhattan Receivers' time 3020
to answer.
116. Opinion of Judge Woolsey.

With respect to the above entitled consolidated cause:

117. Summons to appeal from order of Judge Caffey of September 20, 1932, granting Benjamin F. Johnson leave to sue, and refusal subjoined thereto.
118. Order of severance on appeal from said order of September 20, 1932.
119. Petition for appeal from said order of September 20, 1932, and order of allowance subjoined thereto.
120. Assignment of errors on appeal from said order 3021
of September 20, 1932.
121. Statement re bond on appeal from said order of September 20, 1932.
122. Citation on appeal from said order of September 20, 1932, and admission of service thereof.
123. Order of Judge Woolsey of October 18, 1932, consolidating the first two above entitled causes.
124. Summons to appeal from order of Judge Woolsey of October 16, 1932, consolidating the first two above entitled causes, and refusal subjoined thereto.

022 *Stipulation re Contents of Transcript of Record.*

125. Order of severance on appeal from said order of October 18, 1932.
126. Petition for appeal from said order of October 18, 1932, and order of allowance subjoined thereto.
127. Assignment of errors on appeal from said order of October 18, 1932.
128. Statement re cost bond on appeal from said order of October 18, 1932.
129. Citation on appeal from said order of October 18, 1932, and admission of service thereof.
130. Order of Judge Woolsey of October 18, 1932, va-
023 cating orders made by Judge Manton in the second above entitled cause.
131. Summons to appeal from order of Judge Woolsey of October 18, 1932, vacating orders made by Judge Manton in the second above entitled cause, and refusal subjoined thereto.
132. Order of severance on appeal from said order of October 18, 1932.
133. Petition for appeal from said order of October 18, 1932, and order of allowance subjoined thereto.
134. Assignment of errors on appeal from said order of October 18, 1932.
135. Statement re cost bond on appeal from said order
024 of October 18, 1932.
136. Citation on appeal from said order of October 18, 1932, and proof of service thereof.
137. Stipulation of parties as to the correctness of transcript of record.
138. Stipulation of parties permitting all appeals to be heard on one record.
139. This stipulation.
140. Order approving stipulation as to contents of record.
141. Motion of Protective Committee for Seven Per Cent. Guaranteed Stock of Manhattan Railway

Company to strike the name of the Committee from citations on appeal, and order denying the same.

142. Stipulation waiving the printing of the bonds on appeal.

143. Stipulation waiving printing of verifications to pleadings, and affidavits of service.

144. Minutes of Hearings before Judge Woolsey on October 4th, 6th and 18th, 1932.

Dated, New York, October 27, 1932.

BREED, ABBOTT AND MORGAN
Solicitors for Appellant, The American Brake Shoe and Foundry Company.

JAMES L. QUACKENBUSH
Solicitors for Appellant Interborough Rapid Transit Company.

DILLS, MUECKE AND SCHELKER
Solicitors for Appellant Manhattan Railway Company.

HORNBLOWER, MILLER, MILLER & BOSTON
Solicitors for Appellants Victor J. Dowling and Thomas E. Murray, Jr., as Receivers.

HUGHES, SCHURMAN AND DWIGHT
Solicitors for Appellant William Roberts, as Receiver.

DAVIS, POLK, WARDWELL, GARDINER & REED
Solicitors for Appellants J. P. Morgan and others, as Committee for Interborough Rapid

028 *Stipulation re Contents of Transcript of Record.*

Transit Company Ten Year Secured Convertible 7% Gold Notes and as Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

ROOT, CLARK & BUCKNER
Solicitors for Appellants Charles Hayden and others, as Committee for Ten Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit
029 Company.

COTTON, FRANKLIN, WRIGHT & GORDON
Solicitors for Appellants Van Santvoord Merle-Smith and others, as Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, due April 1, 1990.

DAVIS, POLK, WARDWELL, GARDINER & REED
Solicitors for Appellant Guaranty Trust Company of New
030 York, as Trustee under the first and Refunding Mortgage of the Interborough Rapid Transit Company dated March 20, 1913.

CHARLES FRANKLIN
Solicitor for Appellees Benjamin F. Johnson and Manhattan Railway Company Common Stockholders' Protective Committee.

BOEHM & ZEIGER
Solicitors for Appellee Lillian Boehm.

MARSHALL & WEHLE
Solicitors for Appellee Harold Palmer and others, as Protective Committee for Seven Per Cent. Guaranteed Stock of Manhattan Railway Company.

DAVIES, AUERBACH AND CORNELL
Solicitors for Appellee-Appellant Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company. 303

## Order Approving Stipulation Re Record.

The foregoing stipulation is hereby approved and it is

ORDERED, that the transcript of record shall be made accordingly.

Dated at New York City, this ~~27th~~ 21st day of ~~October~~ November, 1932. 3033

ROBERT P. PATTERSON
U. S. D. J.

3034

## Stipulation Waiving Printing of Verifications.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON, Complainant, *against* MANHATTAN RAILWAY COMPANY, *et al.*, Defendants. | IN EQUITY E. 71-153 |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, *against* INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | IN EQUITY E. 70-364 |
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153 |

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IT IS HEREBY STIPULATED AND AGREED by and between the solicitors for the appellants and the appellees that all pleadings which are to be printed as part of the transcript of record on the appeals in the above entitled causes be deemed properly verified and the printing of the verifi-

cation of said pleadings in the transcript of record, be and the same is hereby waived.

Dated, New York, October 25, 1932.

BREED, ABBOTT AND MORGAN
Solicitors for Appellant, The American Brake Shoe and Foundry Company.

JAMES L. QUACKENBUSH
Solicitor for Appellant Interborough Rapid Transit Company.

DILLS, MUECKE & SCHELKER
Solicitors for Appellant Manhattan Railway Company.

HORNBLOWER, MILLER, MILLER & BOSTON
Solicitors for Appellants Victor J. Dowling and Thomas E. Murray, Jr., as Receivers.

HUGHES, SCHURMAN AND DWIGHT
Solicitors for Appellant William Roberts, as Receiver.

DAVIS, POLK, WARDWELL, GARDINER & REED
Solicitors for Appellants J. P. Morgan and others, as Committee for Interborough Rapid Transit Company Ten Year Secured Convertible 7% Gold Notes and as Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

040 *Stipulation Waiving Printing of Verifications.*

ROOT, CLARK & BUCKNER
Solicitors for Appellants Charles Hayden and others, as Committee for Ten Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company.

COTTON, FRANKLIN, WRIGHT & GORDON
Solicitors for Appellants Van Santvoord Merle-Smith and
041 others, as Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds, due April 1, 1990.

DAVIS, POLK, WARDWELL, GARDINER & REED
Solicitors for Appellant Guaranty Trust Company of New York, as Trustee under the first and Refunding Mortgage of the Interborough Rapid Transit Company dated March 20, 1913.

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CHARLES FRANKLIN
Solicitor for Appellees Benjamin F. Johnson and Manhattan Railway Company Common Stockholders' Protective Committee.

BOEHM & ZEIGER
Solicitors for Appellee Lillian Boehm.

*Stipulation Waiving Printing of Verifications.* 3043

MARSHALL & WEHLE
Solicitors for Appellee Harold Palmer and others, as Protective Committee for Seven Per Cent. Guaranteed Stock of Manhattan Railway Company.

DAVIES, AUERBACH AND CORNELL
Solicitors for Appellee-Appellant Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company. 3044

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3046

## Stipulation re Hearing of Appeals on One Record.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON, Complainant, *against* 3047 MANHATTAN RAILWAY COMPANY, *et al.*, Defendants. | IN EQUITY E. 71-153 |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, *against* INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | IN EQUITY E. 70-364 |
| 3048 IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153 |

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the appeals from the following orders, to wit,

1. Appeal from Order of Judge Caffey made and entered September 20, 1932, granting Benjamin F. Johnson leave to sue.

2. Appeal from order of Judge Woolsey made and entered October 18, 1932, consolidating the causes of Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E-71-153, and American Brake Shoe & Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364.
3. Appeal from order of Judge Woolsey made and entered October 18, 1932, vacating certain orders made by Judge Martin T. Manton in the cause entitled, American Brake Shoe & Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364. 3050

be heard upon the foregoing transcript of record.

Dated, October 28th, 1932.

BREED, ABBOTT AND MORGAN
Solicitors for Appellant The American Brake Shoe and Foundry Company.

JAMES L. QUACKENBUSH 3051
Solicitor for Appellant Interborough Rapid Transit Company.

DILLS, MUECKE AND SCHELKER
Solicitors for Appellant Manhattan Railway Company.

HORNBLOWER, MILLER, MILLER & BOSTON
Solicitors for Appellants Victor J. Dowling and Thomas E. Murray, Jr., as Receivers.

3052 *Stipulation re Hearing of Appeals on One Record.*

HUGHES, SCHURMAN AND DWIGHT
Solicitors for Appellant William Roberts, as Receiver.

DAVIS, POLK, WARDWELL, GARDINER & REED
Solicitors for Appellants J. P. Morgan and others, as Committee for Interborough Rapid Transit Company Ten Year Secured Convertible 7% Gold Notes and as Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

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ROOT, CLARK & BUCKNER
Solicitors for Appellants Charles Hayden and others, as Committee for Ten Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company.

COTTON, FRANKLIN, WRIGHT & GORDON
Solicitors for Appellants Van Santvoord Merle-Smith and others, as Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds due April 1, 1990.

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DAVIS, POLK, WARDWELL, GARDINER & REED
Solicitors for Appellant Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company dated March 20, 1913.

DAVIES, AUERBACH AND CORNELL
Solicitors for Appellant-Appellee Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company.

CHARLES FRANKLIN
Solicitor for Appellees Benjamin F. Johnson; and ~~Nathan L. Amster and others, as~~ Manhattan Railway Company Common Stockholders' Protective Committee.

BOEHM & ZEIGER
Solicitors for Appellee Lillian Boehm.

MARSHALL & WEHLE
Solicitors for Appellees Harold Palmer and others, as Protective Committee for Seven Per Cent. Guaranteed Stock of Manhattan Railway Company.

## Stipulation as to Correctness of Transcript of Record.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| BENJAMIN F. JOHNSON, Complainant, *against* MANHATTAN RAILWAY COMPANY, *et al.*, Defendants. | IN EQUITY E. 71-153 |
| THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant, *against* INTERBOROUGH RAPID TRANSIT COMPANY, Defendant. | IN EQUITY E. 70-364 |
| IN THE MATTER *of the* INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS. | IN EQUITY E. 71-153 |

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a correct and true transcript of the record of the said District Court in the above entitled causes as agreed upon by the parties and the clerk may so certify.

Dated, New York, October 28th, 1932.

BREED, ABBOTT AND MORGAN
Solicitors for Appellant The American Brake Shoe and Foundry Company.

JAMES L. QUACKENBUSH
Solicitor for Appellant Interborough Rapid Transit Company.

DILLS, MUECKE AND SCHELKER
Solicitors for Appellant Manhattan Railway Company.

HORNBLOWER, MILLER, MILLER & BOSTON
Solicitors for Appellants Victor J. Dowling and Thomas E. Murray, Jr., as Receivers.

HUGHES, SCHURMAN AND DWIGHT
Solicitors for Appellant William Roberts, as Receiver.

DAVIS, POLK, WARDWELL, GARDINER & REED
Solicitors for Appellants J. P. Morgan and others, as Committee for Interborough Rapid Transit Company Ten Year Secured Convertible 7% Gold Notes and as Committee for Interborough Rapid Transit Company First and Refunding 5% Gold Bonds.

ROOT, CLARK & BUCKNER
Solicitors for Appellants Charles Hayden and others, as Committee for Ten Year Six Per Cent. Gold Notes due October 1, 1932, of Interborough Rapid Transit Company.

064 *Stipulation as to Correctness of Transcript of Record.*

COTTON, FRANKLIN, WRIGHT & GORDON
Solicitors for Appellants Van Santvoord Merle-Smith and others, as Protective Committee for Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds due April 1, 1990.

DAVIS, POLK, WARDWELL, GARDINER & REED
065 Solicitors for Appellant Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company dated March 20, 1913.

DAVIES, AUERBACH AND CORNELL
Solicitors for Appellant-Appellee Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of Manhattan Railway Company.

CHARLES FRANKLIN
066 Solicitor for Appellees Benjamin F. Johnson; and ~~Nathan L. Amster and others, as~~ Manhattan Railway Company Common Stockholders' Protective Committee.

BOEHM & ZEIGER
Solicitors for Appellee Lillian Boehm.

MARSHALL & WEHLE
Solicitors for Appellees Harold Palmer and others, as Protective Committee for Seven Per Cent. Guaranteed Stock of Manhattan Railway Company.

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## Clerk's Certificate to Transcript of Record.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK. } ss.:

I, CHARLES WEISER, Clerk of the District Court of the United States for the Southern District of New York, DO HEREBY CERTIFY that the foregoing is a true and correct transcript of the records and proceedings had in said court, in the case of Benjamin F. Johnson, Complainant, against Manhattan Railway Company, et al., Defendants, In Equity E. 71-153; in the case of the American Brake Shoe & Foundry Company, Complainant, against Interborough Rapid Transit Company, Defendant, In Equity E. 70-364, and in the Matter of Interborough-Manhattan Receivership Proceedings, In Equity E. 71-153, as agreed on by the parties. 3068

IN TESTIMONY WHEREOF, I have caused the seal of said court to be hereunto affixed at the City of New York in the Southern District of New York, this ~~28th~~ 17 day of November ~~October~~, in the year of our Lord, One thousand nine hundred and thirty-two, and of the Independence of the United States, the 157th.

CHARLES WEISER
Clerk of the United States District Court for the Southern District of New York. 3069

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1932

No. 203

Argued November 14, 1932. Decided December 7, 1932

BENJAMIN F. JOHNSON and LILLIAN BOEHM, Appellees,

v.

MANHATTAN RAILWAY COMPANY et al., Appellants

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Chase, Circuit Judges

Appeals by the Interborough Rapid Transit Company and others from three decrees of the District Court for the Southern District of New York.

Charles H. Tuttle, of New York City, for the American Brake Shoe & Foundry Co.

Nathan L. Miller, of New York City, for Dowling and others, Receivers.

Charles Franklin, of New York City, for Benjamin F. Johnson.

Louis Boehm, of New York City, for Lillian Boehm.

L. HAND, Circuit Judge:

The appeals in question are from three decrees in the suit at bar; the first, giving leave to the plaintiff, Johnson, to sue receivers of the Manhattan Railway Company and the Interborough Railway Company appointed in another suit entitled American Brake Shoe Company v. Interborough Rapid Transit Company; the second, declaring void all decrees entered in that suit up to the time when the decree appealed from was entered, October 18th, 1932; the third, consolidating the two suits, 1 F. Supp. 809.

On August 25, 1932, the attorney for the Interborough Rapid Transit Company verified an affidavit in a suit, not yet begun, entitled American Brake Shoe Company v. In-

terborough Rapid Transit Company, alleging that in his judgment it would be undesirable to have a trust company appointed receiver in the cause and giving his reasons. Whether this was acted upon by the Senior Circuit Judge for the Second Circuit does not appear in the record; but it was filed the next day in the District Court. On the twenty-fifth the Senior Circuit Judge signed an order declaring that the public interest required the designation of a Circuit Judge to hold a District Court within the circuit, and designating himself to hold such a court beginning on that day, particularly to hear all questions arising in the American Brake Shoe Company suit. There was already an order of the same judge, dating from 1930, which designated him generally to hold terms of the District Court for the Southern District of New York without limitation of time. On the twenty-fifth the same judge signed another order, declaring that as a judge designated to hold the District Court, he did not assent to the existing distribution by the District Judges of the business of that court, and that, as Senior Circuit Judge, he directed that for thirty days applications for the appointment of receivers might be made to him. This was because of a rule of the District Court then existing, quoted in the margin.[1] These two orders were filed on August twenty-sixth, and on the same day the bill of the American Brake Shoe Company against the Interborough Rapid Transit Company. This in substance alleged that the plaintiff was a simple creditor of the defendant for supplies, and that it sued on behalf of itself and all others who might join. Further, that the defendant was operating a system of subways in the city of New York, under contracts with the city, and a system of elevated street railways, as lessee of the Manhattan Street Railway Company. It was in large default as to its taxes; it had issued three series of funded obligations, two of them secured; it was liable upon an issue of Manhattan Railway

[1] 11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other cause (except where a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy rules), shall be made to the judge assigned to hold the Bankruptcy and Motion Part of the business of the court and to no other judge.

bonds, and for certain rentals to the Manhattan shareholders; it was in controversy with the city as to items of their mutual accounts; it had a floating indebtedness of two and a half millions. While its assets "at a fair valuation exceed the amount of its liabilities," it was unable to meet its debts then due, together with those soon to fall due, and was exposed to a default upon a mortgage upon all its assets. If left to dismemberment by execution upon the claims of its creditors, it could not continue to perform its public duties, and there would result "wasteful strife and controversy," which could be prevented only in case the assets were sequestered by a court of equity for "equitable distribution among those entitled thereto." To this end it prayed that the court appoint receivers and enjoin all suits against it. The defendant appeared on the same day and consented to such a decree, and the Circuit Judge appointed receivers. The jurisdiction of the District Court over this cause of action depended upon the diversity of citizenship of the parties.

Thereafter various committees for the protection of different groups of creditors were allowed to become parties, and on September sixth, the Manhattan Railway Company, on its own petition alleging its similar financial embarrassment, also intervened, and a separate receiver was appointed for it at its request. The decree of August twenty-sixth was ex parte, except for the defendant's consent, and contained a rule nisi, returnable on September twenty-second, that "the parties" show cause why the receivership should not be continued pendente lite, "and upon the hearing any other creditor, the defendant or other party in interest may be heard." So far as appears no one objected upon the return day, and the receivership was made permanent by decree entered September twenty-eighth. A large number of other interlocutory decrees were passed by the Circuit Judge before the entry of the decree in the suit at bar of October eighteenth, which vacated them all; but their contents are not important here.

Meanwhile on September twenty-first Benjamin F. Johnson, a citizen of Kentucky and a minority shareholder of the Manhattan Railway Company, filed the bill at bar in the District Court against that company and its receiver, the Interborough Rapid Transit Company and its receivers, the city of New York, and the American Brake Shoe

Company. This was on behalf of himself and all other shareholders who might join, and was preceded by an order on Johnson's petition giving him leave to sue the receivers appointed in the American Brake Shoe Company suit, granted by the District Judge then holding the motion part of that court, under the division of business agreed upon by all the regular District Judges of the Southern District of New York. Johnson's bill alleged that the American Brake Shoe Company's suit was beyond the jurisdiction of the Circuit Judge, and that all the decrees passed by him were void. This because the District Judges had provided for the division of business between them, and had promulgated two rules to that intent, of which one has been already quoted, and the other is to be found in the margin.[2]

These it asserted forbade the action of the Circuit Judge, he not having been designated by the Senior District Judge under Rule 1-a, and not holding the motion term when he appointed the receivers, as required by Rule 11-a. On the merits, the bill set up a cause of suit by the Manhattan Company against the Interborough Rapid Transit Company upon certain claims, and a right to an accounting. It prayed the appointment of receivers and general relief.

On the same day, September twenty-first, Lillian Boehm was given leave by the District Judge holding the motion part, to intervene in Johnson's suit, which she did; she was a citizen of New York, and a shareholder of the Manhattan Railway Company; she was also a creditor of the Interborough Rapid Transit Company. On October third, she filed a supplemental bill, based upon the same general grounds as the American Brake Shoe Company's bill, except that she added that the proceedings in that suit were void, and asked as a preliminary to the appointment of receivers that those appointed by the Circuit Judge be vacated. Johnson also filed a petition supplemental to his original bill, not important to the controversy. A number of other interested parties intervened, but their presence does not affect the issues.

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[2] Rule 1-a. Any judge designated to sit in the District Court for the Southern District of New York shall do such work only as may be assigned to him by the Senior District Judge.

On the bills and two supporting petitions Johnson and Boehm procured rules nisi from the District Judge holding the motion term, returnable on October fourth, that the orders of the Circuit Judge of August twenty-fifth, designating himself to hold a District Court, and giving him power to appoint receivers, should be vacated; also, his decree appointing receivers on August twenty-sixth, and his decree of September twenty-eighth, making them permanent, pendente lite. The petitions also prayed the appointment of other receivers and general relief. After a hearing upon the return day at which the parties to the American Brake Shoe Company bill appeared, the District Judge holding the motion term, by decree dated October eighteenth vacated all the decrees of the Circuit Judge in the American Brake Shoe Company suit. 1 F. Supp. 809. He refused to vacate the order of designation, and the order giving the Circuit Judge power to appoint receivers; and he also refused to appoint substituted receivers until an appeal was decided, if one were taken. Before entering this decree, he passed a decree ex mero motu, consolidating the suit at bar with that of the American Brake Shoe Company.

The controversy does not touch the substantial relief asked by any of the parties; all acknowledge that the two railways are in such financial straits that a court of equity must take over their assets, to prevent their dismemberment by execution, attachment and the like. The plaintiffs, and those who have intervened, ask for receivers, just as do the parties to the American Brake Shoe Company suit. The dispute touches merely who shall be the receivers, and who the judge to have charge of the receivership. The question at the outset is whether the rules deprive the Circuit Judge of jurisdiction to proceed under the order designating him to hold the District Court. Their language did indeed forbid him to do so; he was a designated judge, and he was not assigned to hold the motion term; he made clear by his order providing that applications for receivers might be made to him, that he did not mean to be bound by them. However, even though they be valid, and though his decrees might therefore be subject to reversal, these need not be so far without color of authority that they might be ignored as a futility, or vacated by another judge in another suit. If the rules altogether sheared him of his powers, we agree

that the parties were not to be put to a phantom suit which would settle nothing, and on whose results they might not later rely. Suitors have an interest in the conclusion of their controversies, and we may assume that a judge of the same court, called upon to exercise his own jurisdiction, might, as an incident, clear from the records decrees which would otherwise appear to impede his own powers, though in fact they did not. Collateral attacks upon proceedings which have no jurisdictional basis are permissible in many situations; e. g., St. Clair v. Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. Ed. 222; Simon v. Southern Railway, 236 U. S. 115, 35 S. Ct. 255, 59 L. Ed. 492, though we have found no decisions precisely in point here. Thus we think that these appeals do present the limited issue whether the rules, assuming that they are valid, go to the jurisdiction of the judge who disregards them. But we do not find it necessary to decide as to their validity, because, as we shall show, if directory only, that cannot be tested in a separate suit.

Though we are used to regard questions of jurisdiction as sharp and clear, the fact is otherwise. All valid rules of law are imperative; their violation is generally, though not always, a wrong for which in some form or other relief is usually open, if they result in substantial damage. But for obvious practical reasons not all errors go so far to the root as to make the whole proceeding a complete nullity; else the trouble and expense of litigation would go for nothing and controversy never end. Therefore, the law will not scrutinize too nicely a judge's warrant of authority; he may indeed have so little color of office as to stand like a mere interloper, but that is not ordinarily true, if, being duly qualified as a judge, some effort has been made to conform with the formal conditions on which his particular powers depend. The Supreme Court has several times refused to treat such conditions as essential to the validity of his acts. Ball v. U. S., 140 U. S. 118, 11 S. Ct. 761, 35 L. Ed. 377; McDowell v. U. S., 159 U. S. 596, 16 S. Ct. 111, 40 L. Ed. 271; Ex parte Ward, 173 U. S. 452, 19 S. Ct. 459, 43 L. Ed. 765. Though In re Manning, 139 U. S. 504, 11 S. Ct. 624, 35 L. Ed. 264, depended upon Wisconsin law, at least it is an instance of the same doctrine. Our own decision in Luhrig Collieries Co. v. Interstate C. & D. Co., 287 F. 711, is another; more authoritative indeed than the opinion recognized since

the bidder could scarcely have been held to his bid, if the decree directing the sale had been non coram judice. State ex rel. Buisson v. Lazarus, 33 La. Ann. 1425, holds the same even in the case of a constitutional prohibition. Cf. State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409. It is not wholly clear how far the conditions upon a judge's qualifications may be absent and his acts still be immune from collateral attack. We have not that question before us; we mention the doctrine merely as showing the general indisposition of the law to demand of suitors any inquiry into the title of judges to their office, or into their authority to act in a particular cause.

Here there was no infirmity in the authority of the Circuit Judge except through his disregard of the rules. The statute (Judicial Code § 18), 28 USCA § 22, expressly gave him "all the powers and rights" of a District Judge in that district, with exceptions which enlarge rather than limit the latitude of the grant. He was for all purposes at least a District Judge while his designation lasted; and the rules of that court, taken at their widest, stripped him of his jurisdiction no further than if he were duly qualified as such. So viewed, the question is the same as though a District Judge had himself disregarded them, and appointed a receiver though at the time he was not holding the motion term. We cannot doubt that, however valid the rules may be, such a District Judge's decree would still be a judicial act, unassailable collateral. The agreed distribution of business under section twenty-seven (28 USCA) is merely to promote concord and avoid conflict; it may be imperative, so far as it extends, but it does not go to the essence of the judge's power. That is derived from the statutes and the equity rules. Section thirteen of Title 28, USCA and Equity Rule 1 (28 USCA § 723), which follows it, give a District Judge authority to pass all orders "according to the rules and practice of the court;" compliance with every rule of court is not essential to the judge's jurisdiction, nor may his acts be ignored if they do not conform to all. There is a way to correct such errors which must be followed. Yet unless rules for the distribution of business stand on a different footing from rules in general, the decrees vacated were not the empty words of a mere intruder.

So far as the books show, there is no reason to suppose that they cut deeper into a judge's authority to act than others. Foley v. Utterback, 196 Iowa, 956, 195 N. W. 721. People v. Barbera, 78 Cal. App. 277, 248 P. 304, concerned not a rule but a statute, but it is for that reason more compelling. In Scranton Button Co. v. Neonlite Corp'n, 105 N. J. Eq. 708, 149 A. 369, Chancellor Walker did indeed vacate a decree made on the advice of a vice chancellor who had disregarded a rule for the distribution of business, but his decree was in the same suit, and the property had already come into the custody of the Court of Chancery in another suit. In Case v. U. S., 14 F. (2d) 510 (C. C. A. 8), although Judge Sanborn's order was made in pursuance of section 27 of title 28 (USCA), it had been followed by a statute, temporarily imposing the allocation of business so made by him, until the Northern District of Oklahoma should be organized. Judge Van Valkenburgh, in Ex parte Briggs (D. C.) 15 F. (2d) 84, had earlier reached an opposite result, construing the act as no more than perpetuating the modus vivendi established by Judge Sanborn, and possibly that is the better view. But in any event Congress had, preparatory to the erection of the new district, set limits to the activities of the two District Judges; and if it was permissible to construe this as though the district were already in existence, and the powers of the judges territorially limited, the result followed. It is true that Judge Woodrough's opinion went further, and this is perhaps the reason for Judge Scott's concurrence only in the result. If so, judicial opinion in that circuit was at least equally divided as to the effect of the distribution order, taken by itself; and in any case the decision did not turn upon the point. There is thus little or no color of authority for saying that such rules stand in so exceptional a position. It seems to us that they do not. Certainly they cannot enlarge or lessen the jurisdiction of the court itself (Washington-Southern Nav. Co. v. Baltimore & Philadelphia Steamboat Co., 263 U. S. 629, 635, 44 S. Ct. 220, 68 L. Ed. 480); and there appears to be no greater reason to say that they may do so as to the judges individually, whose powers are as much defined by statute. We think that they are only directory, and their disregard was at most no more than an error.

The appellees reply that the situation is like that where a successor has been appointed, and the superseded judge continues to act. U. S. v. Alexander (D. C.) 46 F. 728; Reed v. Bradford, 141 Ark. 201, 217 S. W. 11. The analogy presupposes that the rules as completely strip of power the judge who disregards them, as though he were out of office. To that we cannot agree, for the reasons we have just given. Indeed the decisions are not uniform even as to the acts of a judge who holds over after his successor is appointed. Carli v. Rhener, 27 Minn. 292, 7 N. W. 139; Hamlin v. Kassafer, 15 Or. 456, 15 P. 778, 3 Am. St. Rep. 176.

The vacating decree at bar properly refused to consider the validity of the order of designation of August twenty-fifth, but the appellees attack it here. They say that it appears both from the affidavit of Quackenbush, and from an opinion of the Circuit Judge in the American Brake Shoe Company suit, rendered after the vacating decree, that the only public interest supporting it was the fear that a trust company might be appointed receiver; and that this is not the kind of interest contemplated by the statute. Even so, the order conferred the statutory authority upon the designated judge. The power to designate, granted by 28 U. S. C. A. § 22, is plainly administrative, and parties are not subject to the peril that everything decided may be upset, unless they can satisfy another court that there was adequate occasion for its exercise. The situation is the same as in People ex rel. Saranac Land & Timber Co. v. Extraordinary Special & Trial Term of Supreme Court, 220 N. Y. 487, 116 N. E. 384, for it does not matter that the condition is the "public interest," rather than the appointing judge's "judgment" of that interest. Section 22 was indeed originally the same as sections 17, 20 and 21 in this regard (28 U. S. C. A. §§ 17, 20, 21), but the section was recast generally in 1922 (42 Stat. 639 [28 U. S. C. A. § 22]), and the failure to retain the original phrase was certainly not intended to have such far-reaching consequences. It cannot be that the act of the Chief Justice, for example, or of a Circuit Justice, is to be subjected to a scrutiny when designating a Circuit Judge, to which it is not open in the case of a District Judge. The power can indeed be abused, but the remedy

may be worse than the evil; it is not to the courts that the public must look for correction.

We have said that if the rules were directory only, we would not consider their validity in this suit, because that question must be raised by direct attack. Unless the appellees had no other recourse, this was the proper way. Grant v. A. B. Leach & Co., 280 U. S. 351, 359, 50 S. Ct. 107, 74 L. Ed. 470; Lively v. Picton, 218 F. 401, 408 (C. C. A. 6); Wagner Electric Mfg. Co. v. Lyndon, 282 F. 219 (C. C. A. 8); Blake v. District Court, 59 F. (2d) 78 (C. C. A. 9). They answer that they did have no other recourse, because they could not safely intervene in the American Brake Shoe Company suit under Equity Rule 37 (28 U. S. C. A. § 723). That rule did not prevent them. It is true that any intervention must be "in subordination to, and in recognition of, the propriety of the main proceeding," but the appellees had no quarrel with that. They too wished a receivership, and indeed had no objection to "the propriety of the main proceeding," except for the judge who was to conduct it, and the receivers appointed. As to both, they had their opportunity to appear on the return day of the rule nisi, September twenty-second, to ask for a removal of the cause to another judge, if the rules forbade the Circuit Judge to proceed, and for the appointment of other receivers. The bill at bar was filed on the twenty-first, a week before the decree passed continuing the receivers pendente lite. Nothing had happened, at least before the twenty-second, to their prejudice, and if it was wrong to proceed in the face of the rules, the objection could then have been raised.

Nor would such a course have deprived them on an appeal, for section 227 of title 28 U. S. C. A. includes interlocutory decrees appointing receivers. The decree of August twenty-sixth was ex parte except as to the defendant which consented; as to all others their first opportunity to object was upon the return day. Pacific Northwest Packing Co. v. Allen, 109 F. 515 (C. C. A. 9); cf. Mitchell v. Lay, 48 F. (2d) 79, 84, 85 (C. C. A. 9); Kingsport Press v. Brief English Systems, 54 F. (2d) 497 (C. C. A. 2). Indeed the original appointment was expressly made temporary, and expired with the later decree; the receivers held thereafter only by appointment under that decree. Grand Beach Co. v. Gardner, 34 F. (2d) 836 (C. C. A. 6),

touched a decree denying a motion to vacate the appointment of a receiver, which had originally been made on notice; it was in substance a decree on rehearing.

The consolidation decree did not change the status of the parties to the suit at bar, though perhaps it was meant to do so. Had it made them parties to the American Brake Shoe Company suit, the rules might be before us, even though only directory. But consolidation does not merge the suits; it is a mere matter of convenience in administration, to keep them in step. They remain as independent as before, and if one hangs for its jurisdiction upon the other, consolidation adds nothing; the dependent jurisdiction is as good without it. Toledo, etc., R. R. Co. v. Continental Trust Co., 95 F. 497, 506 (C. C. A. 6); Taylor v. Logan Trust Co., 289 F. 51, 53 (C. C. A. 8); Nolte v. Hudson Navigation Co., 11 F. (2d) 680, 682 (C. C. A. 2).

Finally, the appellees assert that the decrees are not appealable. The decree granting Johnson leave to sue the receivers, necessarily dissolved the injunction issued in the American Brake Shoe Company suit. True, it did so in another suit, but that can make no difference. The vacating decree likewise dissolved the injunctions granted by the decrees in the American Brake Shoe Company suit, and pro tanto appealable under 28 U. S. C. A. § 227. But it went much further, and seems to us, properly speaking, a final disposition. It vacated all that had been done theretofore, and must consistently have been followed by similar action, if more decrees were passed in the other suit. It did indeed leave the bill on file, but on condition that no proceedings might be taken under it, except by another judge. Certainly this was more than interlocutory.

There is more doubt as to the appealability of the consolidation decree. In so far as it may have attempted to effect an intervention of the parties to the suit at bar in the American Brake Shoe Company suit, along with consolidation, it was probably appealable in any case. Adler v. Seaman, 266 F. 828 (C. C. A. 8). This may have been its province; we are not sure. But in any case it seems to us that it must be within our jurisdiction now, since, if erroneous, there is no other means of correcting the error. It did not affect the substantial rights of the parties; there would be nothing to correct upon appeal from

a final decree, at which for the first time interlocutory proceedings may be brought up. We could only say that though the suits should not have been consolidated, the damage was past and could not be corrected; the question would have become moot and would not survive. Meanwhile the parties would have been forced into a partnership to which they should not have been subjected. In such circumstances, in order to prevent the defeat of our appellate jurisdiction, we may have recourse to the writs appropriate to that situation. As we apprehend that it will not be necessary, we do not now decide which we should use, but content ourselves with saying that the decree seems to us wrong. As we understand that it was intended to be merely ancillary to the vacating decrees, upon the merits they will fall together. It is not therefore necessary to consider whether, standing alone, it was proper.

It appears to us therefore that, taking the appellees' argument at its face as to the validity of the rules, and their protest as to the propriety of the order of designation of August twenty-fifth, the decrees appealed from were erroneous. We have nothing to do now with the sufficiency of Johnson's original bill, or of Boehm's supplementary bill; we express no opinion as to either.

Decrees reversed.

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UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 14th day of December, one thousand nine hundred and thirty-two.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

BENJAMIN F. JOHNSON, Plaintiff-Appellee,

vs.

MANHATTAN RAILWAY COMPANY et al., Defendants-Appellants

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Plaintiff-Appellant,

vs.

INTERBOROUGH RAPID TRANSIT COMPANY, Defendant-Appellant

In the Matter of INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decrees of said District Court be and hereby are reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Benjamin F. Johnson vs. Manhattan Railway Company et al. (and another case). Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 14, 1932. William Parkin, Clerk.

PETITION AND NOTICE OF MOTION TO AMEND OPINION

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

E 71-153

BENJAMIN F. JOHNSON, Complainant-Appellee,

against

MANHATTAN RAILWAY COMPANY et al., Defendants-Appellants

E 70-364

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY, Complainant-Appellant,

against

INTERBOROUGH RAPID TRANSIT COMPANY, Defendant-Appellant

E 71-153

In the Matter of the INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS

SIRS:

Please take notice, that upon the annexed petition of Benjamin F. Johnson, verified the 14th day of December, 1932, upon the transcript of record herein to this Court, and the opinion of this Court rendered herein on the 7th day of December, 1932, and upon all the proceedings had herein, the undersigned will move this Court at a Term thereof, to be held in the old Post Office Building, Park Row and Broadway, in the Borough of Manhattan, City of New York, on the 19th day of December, 1932, at 10:30 A. M. on said day, or as soon thereafter as counsel can be heard, for an order amending the opinion of this Court hereinabove mentioned, by adding thereto, at the end thereof after the words "decrees reversed" the words "without costs", and for such other and further relief as

to the Court may be deemed just and proper in the premises.

Dated New York, December 14th, 1932.

Yours, etc., Charles Franklin, Solicitor for Complainant Appellee. Office & P. O. address: No. 165 Broadway, Borough of Manhattan, New York City. Boehm & Zeiger, Solicitors for Intervenor Appellee, Lillian Boehm. Office & P. O. address: No. 30 Broad Street, Borough of Manhattan, New York City.

To Breed, Abbott and Morgan, Esqs., Solicitors for Appellant The American Brake Shoe and Foundry Company, No. 15 Broad Street, New York City; James L. Quackenbush, Esq., Solicitor for Appellant Interborough Rapid Transit Company, No. 15 Park Row, New York City; Dills, Muecke and Schelker, Esqs., Solicitors for Appellant Manhattan Railway Company, No. 100 East 42nd Street, New York City; Hornblower, Miller, Miller & Boston, Esqs., Solicitors for Appellants Victor J. Dowling and Thomas E. Murray, Jr., as Receivers, No. 15 Broad Street, New York City.

To Hughes, Schurman and Dwight, Esqs., Solicitors for Appellant William Roberts, as Receiver, No. 100 Broadway, New York City; Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Solicitors for Appellants J. P. Morgan and others, as Committees, etc., 15 Broad Street, New York City; Root, Clark & Buckner, Esqs., Solicitors for Appellants Charles Hayden and others, as Committee, etc., No. 31 Nassau Street, New York City; Cotton, Franklin, Wright & Gordon, Esqs., Solicitors for Appellants Van Santvoord Merle-Smith and others, etc., No. 63 Wall Street, New York City; Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Solicitors for Appellants Guaranty Trust Company of New York, etc., No. 15 Broad Street, New York City.

In the United States Circuit Court of Appeals for the Second Circuit

E 71-153

Benjamin F. Johnson, Complainant-Appellee,

against

Manhattan Railway Company et al., Defendants-Appellants

E 70-364

The American Brake Shoe and Foundry Company, Complainant-Appellant,

against

Interborough Rapid Transit Company, Defendant-Appellant

E 71-153

In the Matter of the Interborough-Manhattan Receivership Proceedings

To the United States Circuit Court of Appeals for the Second Circuit:

The petition of Benjamin F. Johnson respectfully shows to this Court:

1. That he is the complainant in the first above entitled action.

2. That on or about October 18th, 1932, a decree was signed by Judge John M. Woolsey, United States District Judge, consolidating the first above entitled cause with the second above entitled cause under the caption of the third above entitled cause and that upon such consolidation having been made said District Judge John M. Woolsey signed an order vacating and setting aside all the orders made by Senior Circuit Court Judge Martin T. Manton in the second above entitled cause.

3. That thereafter an appeal was prosecuted by the defendants in the first above entitled cause to this Court from

said orders and thereafter such proceedings were duly had that on December 7th, 1932, this Court rendered an opinion reversing the decrees above mentioned.

4. In said opinion Judge Learned Hand did not state that said decrees were reversed without costs and, therefore, as I am informed by the Clerk of this Court, the appellants herein are entitled to tax the costs of said appeal under the rules of this Court providing that in case of the reversal of a decree in this Court, costs shall be allowed to the parties seeking review "unless otherwise ordered by the Court."

5. That on or about December 9th, 1932, there was served upon me a notice that said appellants would apply to the Clerk of this Court on December 12th, 1932, at 10 A. M. for taxation of the costs of the transcript of the record in this case in the sum of $9,427.10, as part of the costs to be inserted in the mandate of this Court.

6. On the return day of said application, the taxation of said costs was adjourned to December 14th, 1932, and on the latter date was again adjourned to December 21st 1932, at 11 A. M.

7. The sum of $9,427.10, which the appellants are endeavoring to tax, is the amount of the printers' bills for printing the transcript of record on appeal herein, which consisted of about 1035 pages. Included in the said bills is an item of approximately $5,800 for about 1,000 hours of overtime, allegedly employed in printing up the record at excessive rates per hour for such work. Said bills also include a charge of $1,252 for printing 120 additional copies of the transcript not used upon this appeal, in addition to the 30 copies for which separate charge is made. It is claimed by your petitioner that the rate for printing the said 30 copies is excessive, and that the said 120 additional copies were unnecessary and were never used by the appellants. The said bills further include items aggregating $383 for remake-up of printed matter, and for other matter which, after printing, was not used in the record.

8. Petitioner alleges that under the circumstances surrounding the prosecution of this case the Court in its dis-

cretion should not award any costs against the appellees for the following reasons:

(a) This proceeding was brought largely for the purpose of testing the right of Senior Circuit Judge Martin T. Manton to appoint himself District Judge in order to take jurisdiction in the second above entitled case, and also to test his right, after he designated himself, to disregard Rules 1-a and 11-a of the General Rules of the United States District Court for the Southern District of New York. In instituting said cause, the appellees rendered a distinct public service in endeavoring to have the validity of the procedure of Senior Circuit Judge Martin T. Manton passed upon and to have it determined whether such procedure was in accordance with ruling authority, and particularly whether said Rules 1-a and 11-a have binding force, and also to have it established at the outset of the second of the above entitled causes, whether such proceeding was based upon a sound foundation, so that all parties could deal with the Receivers of said Interborough Rapid Transit Company in the assurance that their appointment was without any jurisdictional defects. The Interborough and Manhattan interests themselves were benefited by said appeal and adjudication.

(b) The question determined on this appeal was one of prime public importance and of wide public interest, not only in the Southern District of New York and this Circuit, but in all the circuits throughout the country, determining the jurisdiction and power of the Senior Circuit Judge to designate himself to sit in the District Court and his rights and powers when sitting in the District Court, in relation to the rule making powers of the District Court and its rules for the division of business made pursuant thereto. This question necessarily required adjudication of this Appellate Court sooner or later, and the sooner the better, for it affected the orderly administration of justice in the Southern District of New York, and the proper functioning of the District and Circuit Courts throughout the country.

(c) This is not a proceeding where the defendants are in the same position as private parties, who had spent money out of their own pocket to defend their individual rights, but it is rather a case where the receivers of large quasi-public corporations engaged in transportation are the de-

fendants, so that any moneys spent in prosecuting the appeal will not come out of the pockets of such receivers, but will be so distributed that no one person will have to bear much of a burden in defraying the expense. This consideration should have particular weight in view of the fact that at the time of the receivership said Interborough Rapid Transit Company had in excess of $9,000,000 in cash in its treasury.

Under the above unusual state of facts, the petitioner submits that a great injustice would be done to the appellees if they were muleted in the enormous sum which is sought to be assessed against them, or even in a reduced sum, where the cause was not instituted solely on their own behalf, but on behalf of the minority stockholders and bondholders of the Interborough Rapid Transit Company and Manhattan Railway Company, and where the entire burden of payment would fall upon them who are little able to bear the same in addition to the enormous losses which they have sustained by virtue of the receivership of both said Interborough Rapid Transit Company and Manhattan Railway Company.

Petitioner, therefore, asks that this Court in its discretion amend its opinion, so that said opinion should provide that the decrees referred to be reversed, but without costs.

Dated December 14, 1932.

Benjamin F. Johnson, by Charles Franklin, Solicitor.

State of New York,
County of New York,
Southern District of New York, ss:

Charles Franklin, being duly sworn, deposes and says, that he is the solicitor for the petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes the same to be true.

Deponent further says that the grounds of deponent's belief as to all matters not stated upon his knowledge, are his familiarity with this entire litigation from its inception to the date hereof, including the opinion of this Court ren-

dered on the appeal herein and the application made by the solicitors for the receivers of the Interborough Rapid Transit Company to tax the costs of said appeal, and the reason why this verification is made by deponent and not by the petitioner is that said petitioner is not within this jurisdiction, being now in Winchester, Kentucky, where he resides.

Sworn to before me this 14th day of December, 1932.
Llewellyn Hernly, Notary Public Queens County, Queen's Co. Clerk's No. 2151, Queen's Co. Reg's No. 2117, New York's Clerk's No. 672, New York Co. Reg's No. 4H667. Commission expires March 30, 1934.

(Signed) Charles Franklin.

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In the United States Circuit Court of Appeals for the Second Circuit

E71-153

Benjamin F. Johnson, Complainant-Appellee,

against

Manhattan Railway Company et al., Defendants-Appellants

E70-364

The American Brake Shoe and Foundry Company, Complainant-Appellant,

against

Interborough Rapid Transit Company, Defendant-Appellant

E71-153

In the Matter of the Interborough-Manhattan Receivership Proceedings

State of New York,
County of New York, ss:

Carl M. Owen, being duly sworn, deposes and says: that he is a member of the firm of Hornblower, Miller, Miller &

Boston, Solicitors for the Receivers of Interborough Rapid Transit Company and makes this affidavit in opposition to the motion to amend the opinion of this court so as to provide that the decrees be reversed without costs.

Prior to the serving of the motion papers on this application, deponent's firm had made an application before the Clerk to tax the cost of the record as part of the costs to be inserted in the mandate of this court. The hearing on this application was adjourned by the Clerk to December 21st to enable the appellees to make this motion.

While it is true that the greater part of the petition upon which this applicaion is based is devoted to reasons why the court should exercise its discretion to omit costs entirely, nevertheless in paragraph 7 of said petition there are statements intended to raise before the court upon this motion the point that the cost of the transcript of record (which is only one item of the taxable costs) was excessive. Deponent submits that the only question properly before this court upon this motion is whether the costs should be included in the decision of the court upon the appeals and that the extent and the amount of those costs should properly be reserved until such time as the clerk has taxed the costs and a dissatisfied party has moved to retax before the court.

However, in view of the statements contained in paragraph 7 of said petition deponent will briefly state the facts respecting the preparation and cost of the transcript of record. The record as finally settled and served consisted of 1025 pages. 150 copies of the transcript were printed. Altogether at the time the transcript of record was served there were 15 parties to the appeals, 4 of whom were appellees on all of the appeals and one of whom (Central Hanover Bank and Trust Company, as Trustee) was an appellee on two of the appeals and an appellant on the third appeal. Deponent is informed and verily believes that under the provisions of the United States Code and the Rules of this Court (28 U. S. Code, Sections 865 and 866; Rule XXI of the Rules of this Court) the appellants had the privilege of filing 50 copies of the transcript of record in this court and had the duty of providing three copies of the transcript for each of the parties to the appeal. These provisions thus required a total of 95 copies.

Additional copies were printed to provide for the event that the case might go to the Supreme Court of the United States. In such event it would be necessary to file 30 additional copies of the transcript in the office of the Clerk of the Supreme Court and to serve a copy of said transcript upon counsel for each of the parties a second time (Rule 13, sub-div. 5 and Rule 38, sub-div. 7 of the Rules of the Supreme Court), thus taking a further 75 copies. This does not take into consideration the fact that on filing the petition for certiorari a copy of the printed record and supporting brief would have to be served on counsel for respondents (Rule 38, sub-div. 3 of the Rules of the Supreme Court).

Paragraph 7 of the petition assumes that it was only necessary to print 30 copies for use upon the appeals to this Court. As shown above, that is not the case.

Two hundred and Twenty-two pages of the transcript consisted of the minutes of the oral argument before Judge Woolsey preceding the entry of the orders appealed from. These minutes were included in the transcript at the insistence of the appellees and over the protest and objection of the appellants. The cost of adding this unnecessary material to the transcript amounted to $710.40.

The claim made by the appellees that they were acting in the public interest is, deponent submits, without foundation. Deponent does not know by what right they made themselves the self-appointed guardians of the public interest. The acts of appellees were a distinct disservice, not only to the parties to the Brake Shoe suit, but also to all the creditors of Interborough Rapid Transit Company and the Manhattan Railway Company. The action of these appellees, without warrant, temporarily put the whole Interborough and Manhattan receiverships under a cloud and seriously embarrassed the creditors and stockholders of the companies. As a matter of fact, every person who is familiar with this proceeding is confident that the entire conduct of the appellees was directed toward getting themselves into some position in the situation. Their activities were in fact self-seeking and not in any way inspired by any public interest.

As a further reason for relieving them from the costs of this appeal, the appellees urged this Court to transfer

the cost to the Interborough security holders in general on the ground that the burden will thus be distributed among a great many, rather than placed upon them. In other words, they ask this Court to lend its assistance and sympathy to a misappropriation of the funds of the receivership estate. Under their doctrine, wherever a receiver appeals and prevails, he nevertheless should pay the expenses of the appeal.

Deponent submits that the Court should take into account that the costs which are taxable are a very small part of the great expense to which the parties to the Brake Shoe Case have been put by reason of the unwarranted procedure of the appellees. The parties to the Brake Shoe Case have had to spend a great deal of money employing counsel in a difficult proceeding to undo the harm caused by the activities of the appellees and, in addition to the expenses of counsel, have had to expend a great deal of money in the preparation and printing of briefs.

Deponent submits that if it were in the power of the Court to make a special award to the appellants by way of penalty to the appellees for a purely vexatious litigation, this is a case where that should be done. It is decidedly not a case where the appellees should be relieved of the payment of legitimate costs.

The appellees have placed in jeopardy for a considerable period the property of the Interborough Rapid Transit Company and Manhattan Railway Company and the interests of their security holders.

Deponent, therefore, respectfully submits that the motion should be denied.

Carl M. Owen.

Sworn to before me this 21st day of December, 1932. Mae J. Cannon, Notary Public, Kings County. Kings Co. Clerk's No. 92, Register's No. 4088. New York Co. Clerk's No. 166, Reg. No. 4085. My Commission Expires March 30, 1934.

[Endorsed:] United States Circuit Court of Appeals for the Second Judicial District. Benjamin F. Johnson, Complainant-Appellees, against Manhattan Railway Company et al., Defendants-Appellants. In Equity. E-71-153. The American Brake Shoe and Foundry Company, Complain-

ant-Appellant, against Interborough Rapid Transit Company, Defendant-Appellant. In Equity. E-70-364. In the Matter of the Interborough-Manhattan Receivership Proceedings. In Equity. E-71-153. Affidavit in opposition to motion to amend opinion. Hornblower, Miller, Miller & Boston, Solicitors for Receivers, Office & Post Office Address, 15 Broad Street, New York City.

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UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 29th day of December, one thousand nine hundred and thirty-two.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

BENJAMIN F. JOHNSON, Plaintiff-Appellee,

vs.

MANHATTAN RAILWAY COMPANY et al., Defendants-Appellants

(And Another Case)

A motion having been made herein by counsel for the appellees to amend the opinion of this court by adding thereto, at the end thereof after the words "decrees reversed" the words "without costs",

Upon consideration thereof it is

Ordered that said motion be and hereby is granted.

Further ordered that the order for mandate hereof entered herein be and herby is amended accordingly.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals Second Circuit. Benjamin F. Johnson vs. Manhattan Railway Co. et al. Order. United States Circuit Court of Appeals-Second Circuit. Filed Dec. 29, 1932. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 1047, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Benjamin F. Johnson, Plaintiff-Appellee, vs. Manhattan Railway Company et al.; The American Brake Shoe and Foundry Company, Plaintiff-Appellant, vs. Interborough Rapid Transit Company, Defendant-Appellant; In the Matter of Interborough-Manhattan Receivership Proceedings, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 10th day of February, in the year of our Lord one thousand nine hundred and thirty-three, and of the Independence of the said United States the one hundred and fifty-seventh.

Wm. Parkin, Clerk. (Seal United States Court of Appeals, Second Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 20, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is advanced and assigned for argument on Monday, April 17th next after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

---

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 20, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is advanced and assigned for argument on Monday, April 17th next after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FEB 18 1
CHARLES ELMORE

IN THE

# Supreme Court of the United States

No. 711

BENJAMIN F. JOHNSON

*Petitioner*

*against*

MANHATTAN RAILWAY COMPANY, *et al.*

*Respondents*

---

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY

*Respondent*

*against*

INTERBOROUGH RAPID TRANSIT COMPANY

*Respondent*

---

In the Matter

of the

INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS

---

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

---

ALFRED C. B. McNEVIN
CHARLES FRANKLIN
HERBERT GOLDMARK
LEONARD H. GOLDENSON
*Counsel for Petitioner*

---

APPEAL PRINTING CO., 32 THAMES ST., NEW YORK CITY

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IN THE

# Supreme Court of the United States

No.

BENJAMIN F. JOHNSON,
*Petitioner,*
*against*
MANHATTAN RAILWAY COMPANY, *et al.*,
*Respondents.*

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
*Respondent,*
*against*
INTERBOROUGH RAPID TRANSIT COMPANY,
*Respondent.*

In the Matter
of the
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Benjamin F. Johnson, respectfully shows as follows:

## I. Nature of Proceedings and Decision Below.

In the first above-entitled equity cause, hereafter referred to as the *Johnson* suit, two orders were made, one by Hon. FRANCIS G. CAFFEY, District Judge, granting petitioner leave to file the bill of complaint in said *Johnson* suit (R. 7); and the other by Hon. JOHN M. WOOLSEY, District Judge, consolidating said *Johnson* suit with the second above-entitled cause, hereafter referred to as the *Brake Shoe* case (R. 722). A further order was made by District Judge WOOLSEY in the third above-entitled cause, vacating and setting aside the orders made by Senior Circuit Judge MANTON in the *Brake Shoe* case appointing receivers of the defendants, Interborough Rapid Transit Company and Manhattan Railway Company, and the orders subsequent thereto (R. 725). (1 Fed. Supp. 809, Adv. Sheets Jan. 9, 1933.)

The United States Circuit Court of Appeals reversed all three of the above-mentioned orders. (61 Fed. [2d] 934, Advance Sheets of January 23rd, 1933.)

The case presents questions of prime importance to the public in the administration of justice in all of the district courts of the United States, and particularly in the District Court for the Southern District of New York, in that it involves the construction of Sections 18 and 23 of the Judicial Code, which have not heretofore been interpreted by the Supreme Court of the United States, and also the interpretation of two rules of the effective General Rules of the District Court for the Southern District of New York adopted June 30, 1932, designated as Rules 1-a and 11-a, which the Court below has held to be merely directory, so that the disregard and violation thereof by Judge MANTON in entertaining the *Brake Shoe* case and appointing receivers therein does not render his action *coram non judice*.

Among the grounds upon which petitioner asks for a review of the decision is, that the Court below misconstrued the meaning of Equity Rule 37, promulgated by this Court, and failed to follow the case of *United States* v. *California Canneries*, 279 U. S. 553, and the case of *Central Republic Bank & Trust Company* v. *Caldwell*, 58 Fed. (2d) 721 (C. C. A., 8th Circuit), interpreting said Rule 37, in that the Court below held that, notwithstanding that petitioner sought to impeach the decree of Judge MANTON appointing receivers of the Interborough and Manhattan companies, it was nevertheless incumbent upon petitioner to intervene for that purpose in the *Brake Shoe* case, the Court holding that said relief could not be had by means of an independent bill.

It appears in this case that a simple contract creditor, with the consent of Interborough and Manhattan, two railroad corporations, obtained the appointment of friendly receivers for both corporations, in spite of the warning by this Court against such practices in *Harkins* v. *Brundage*, 276 U. S. 36; and *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334. The Circuit Court of Appeals for the Second Circuit in *Kingsport Press* v. *Brief English Systems*, 54 Fed. (2d) 497, and again, in denying a writ of prohibition against the District Court proceeding herein (*Ex Parte Relmar Holding Co.* [61 Fed. (2d) 941], held that *Harkins* v. *Brundage* was not intended to apply to railroad corporations. We submit that this Court should determine whether the procedure followed in this case for the purpose of challenging the jurisdiction of the Court, and the appointment of receivers, was justified.

The New York bar, and the Judges of the District Court, cannot understand the repeated flouting of the effective rules governing equity receiverships in this district. Instead of clarifying the situation, the lower Court has created more doubt and uncertainty than before its decision. Moreover,

the magnitude of the financial interests at stake, involving approximately $600,000,000, and embracing the elevated and subway transportation systems of the City of New York, makes it essential, petitioner submits, that this court of last resort should pass upon the question whether the decision of District Judge WOOLSEY in declaring void the orders appointing such receivers was correct (R. 694-721).

## II. Statement of Salient Facts.

On August 25, 1932, Senior Circuit Judge MANTON made an order designating and assigning himself to hold a District Court of the United States for the Southern District of New York during the period commencing August 25, 1932, and particularly, to hear and determine all applications and proceedings in the matter entitled *American Brake Shoe and Foundry Company* against *Interborough Rapid Transit Company* (R. 177). Judge MANTON predicated his right so to designate himself upon Section 18 of the Judicial Code (Section 22 of the Code of Laws of the United States) to which specific reference is made in said order. Said Section 18 reads as follows:

> "The Chief Justice of the United States or the Circuit Justice of any Judicial Circuit or the Senior Circuit Judge thereof, may, if the public interest requires, designate and assign any Circuit Judge of a Judicial Circuit to hold a District Court within such Circuit."

The said order of designation recited that Judge MANTON found that the public interest required such designation of himself.

After signing the above-mentioned order, Judge MANTON at the same time made another order predicated upon Section 23 of the Judicial Code. Said section reads as follows:

> "In Districts having more than one District Judge, the judges may agree upon a division of business and assignment of cases for trial in said District, but in case they do not so agree, the Senior Circuit Judge of the Circuit in which the District lies shall make all necessary orders for the division of the business and the assignment of cases for trial in said District."

In this second order, Judge MANTON after referring to his designation of himself as a District Judge, sets forth that he disagrees with the other judges of said District Court as to division of business and assignment of cases for trial in said district, and therefore directs that for a period of thirty days from the date of said order, all applications for the appointment of receivers in equity causes in said district might be made not only to the District Judge regularly designated to hear such application pursuant to Rule 11-a of the General Rules of said District Court, but also to himself (R. 178).

Rule 11-a referred to in said order was adopted on June 30, 1932, by all of the eight District Judges for the Southern District of New York, and reads as follows:

> "All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the bankruptcy rules), shall be made to the judge assigned to hold the bankruptcy and motion part of the business of the court and to no other judge."

It was found by District Judge WOOLSEY in his opinion that both of the above orders were bound together under one cover, and were filed in the Clerk's office on August 26, 1932, that is, on the day after they were made. At the same time, there were filed in said Clerk's office the bill of complaint in the *Brake Shoe* case, an affidavit entitled "Affidavit

Showing the Necessity of Individual Receivers" (R. 175), and the order of Judge MANTON made August 26, 1932, appointing receivers of the Interborough (R. 705 and 715).

It was conceded that on August 26, 1932, when said receivership order was made, Hon. ROBERT P. PATTERSON, District Judge, was the Judge duly assigned to hold the motion part of the business of said Court, and that he was in court, or in chambers, ready to receive and act upon any applications for equity receiverships, and that such application for the appointment of receivers of the Interborough was not made to him (R. 717 and 718).

It was also stated in the opinion of the Circuit Court of Appeals that Judge MANTON in appointing receivers of the Interborough had no intention of being bound by Rule 11-a above mentioned.

It further appeared that Judge WOOLSEY had polled all the District Judges and that there was no disagreement among them as to the division of business in said District or as to the validity of Rule 11-a (R. 717).

From the bill of complaint in the *Brake Shoe* case, it appeared that complainant was only a simple contract creditor, and upon consent of the Interborough, Judge MANTON appointed receivers for said company (R. 154, 168, 171, 180).

On September 6, 1932, Judge MANTON made a further order on consent of the Manhattan, extending the receivership to that company and appointing a receiver thereof (R. 196).

Thereafter numerous orders of intervention of various parties and administrative orders were made by Judge MANTON.

On September 20, 1932, Hon. FRANCIS G. CAFFEY, District Judge, made an order granting leave to petitioner to file the bill of complaint in the *Johnson* suit (R. 7), and on the fol-

lowing day, the bill was filed. *All of the parties who at that time, were parties to the Brake Shoe case, were made parties defendant in the Johnson suit.*

In said bill (R. 13), it was alleged that all of the orders of Judge Manton were void, in that he lacked power to designate himself District Judge for the purpose of hearing said *Brake Shoe* case but, if lawfully designated, had violated Rule 11-a of the General Rules of said Court in appointing receivers. Said bill further alleged that the appointment of the receivers of the Interborough and the receiver of Manhattan was improper, on account of the relationship of said receivers to said companies prior to their appointment (R. 70, 72, 74, 75, 24, 25, 26). The prayer of said bill was that all of the orders of Judge MANTON be vacated and set aside, and that independent receivers be appointed of said Interborough and Manhattan companies. Two supplemental bills were thereafter duly served and filed in the *Johnson* suit (R. 49 and 69).

Later one Lillian Boehm and other parties intervened in the *Johnson* case (R. 69 and 80).

## III. Errors of the Court Below Were as Follows:

(a) The Court should have held that, upon the facts presented, it affirmatively appeared that there was no public interest which authorized Judge MANTON to designate himself a District Judge to appoint receivers in the *Brake Shoe* case, and hence that his acts as District Judge were *coram non judice*.

(b) That as there was no disagreement among the District Judges as to division of business or assignment of cases for trial, and as such alleged disagreement was the sole basis upon which Judge Manton designated himself a District Judge for the purpose of assuming jurisdiction in the

*Brake Shoe* case, both the order of designation and the order in which Judge MANTON permitted applications for the appointment of receivers in equity causes to be made to him, were without authority of law and were therefore void.

(c) The Court below erred in holding that Rule 11-a was merely directory, and that the violation thereof by Judge MANTON did not constitute a jurisdictional defect rendering entertainment of the *Brake Shoe* case and the appointment of receivers therein void.

(d) Another error of the Court below was that, on the assumption that Rule 11-a was only directory, the appointment of receivers by Judge MANTON in violation of said rule could be attacked only by intervention of the petitioner in the *Brake Shoe* case, and not by independent bill, wherein all the parties to the *Brake Shoe* case were made defendants.

(e) The Court below erred in not holding that the complainant in the *Brake Shoe* case, which was only a simple contract creditor, did not have the requisite status to have receivers appointed for the Interborough, in a collusive proceeding where only the Interborough, but none of its stockholders or bondholders, consented to such receivership.

To summarize: Petitioner contends that both of Judge MANTON's designations being unauthorized by the sections under which Judge MANTON purported to act, since the conditions precedent therein named were not present, there was no United States District Court forum created in which Judge MANTON had a right to act. If we are correct in said contention, it would be unnecessary to consider the validity and force of Rule 11-a or Rule 1-a of said General Rules of the Court.

If, however, Section 18 of the Judicial Code gave validity to the designation, then we are confronted with two general rules of the United States District Court, duly adopted pursuant to special statutes. We submit that said rules, even though the authority to adopt them, is predicated upon the general rule making power of the District Court, under Section 731 of Title 28 of the United States Code, have the force of a statute. These particular rules, however, were enacted, in pursuance of a specific statute, namely, Section 23 of the Judicial Code, which authorizes the District Judges, in a district having more than one Judge, to agree upon a division of business and, therefore, we submit that they are mandatory and not merely directory. Therefore, the receiverships created in defiance of Sections 18 and 23 of the Judicial Code and the flouting of the General Rules of the Court adopted in pursuance of said Section 23, rendered the orders appointing receivers ineffective and void.

There is presented herewith a certified transcript of the record in this cause in the Circuit Court of Appeals.

Wherefore, petitioner respectfully prays for the allowance of a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, to the end that this cause may be certified to this Court for determination by it, and that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

Benjamin F. Johnson,
By Alfred C. B. McNevin,
Charles Franklin,
Herbert Goldmark,
Leonard H. Goldenson,
*Counsel for Petitioner.*

IN THE

# Supreme Court of the United States

No.

BENJAMIN F. JOHNSON,
*Petitioner,*
*against*
MANHATTAN RAILWAY COMPANY, *et al.*,
*Respondents.*

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
*Respondent,*
*against*
INTERBOROUGH RAPID TRANSIT COMPANY,
*Respondent.*

In the Matter
of the
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(The opinion of the Circuit Court of Appeals, per L. HAND, C. J., is reported in 61 Fed. [2d] 934. The opinion of the District Court, per WOOLSEY, D. J., is reported in Federal Supplement, Vol. I, issued January 9, 1933, at pp. 809-820.)

## POINT I.

**In reaching the conclusion that Judge Manton had the power to appoint receivers in the *Brake Shoe* case the Court below erred, in that it predicated such power solely on the order of designation of August 25, 1932, whereas both orders of that day, which were physically joined, should have together been regarded as the source of such power, and, when so considered, the power to appoint receivers would have clearly been shown not to exist.**

**(a) The division of business order was void, and therefore the order appointing receivers was void.**

On August 25, 1932, Judge MANTON made two orders, which were bound together, the first designating himself as a District Judge particularly to hear the *Brake Shoe* case, the other reciting a disagreement between himself and the other District Judges as to the division of business and therefore directing that applications for the appointment of receivers in equity causes might be made to him, as well as to the Judge regularly assigned to the motion part of the Court, notwithstanding the inhibition of Rule 11-a of the General Rules of said Court.

It is plain that without the second order, the first order would have been ineffective to accomplish the purpose which Judge MANTON had in mind in designating himself a District Judge, as we shall hereafter show, which was to appoint individual receivers of the Interborough. The first order merely made Judge MANTON a District Judge to hear the *Brake Shoe* case, but not to appoint receivers therein; before he could do that, it was necessary for him to show a disagreement between himself and the other district judges as to what judge should hear applications for receivers in

equity causes, in order to override Rule 11-a which required such applications to be made only to the Judge assigned to the motion part of the Court. Judge MANTON evidently deemed the second order necessary in order to give him the power to appoint receivers in the *Brake Shoe* case.

It follows, therefore, that the question whether there was any public interest which justified Judge MANTON's designation of himself as District Judge must be determined by a consideration of the validity of the second order, and cannot be based merely upon the validity of the first order, assuming for the moment that such first order is not subject to justifiable attack in itself.

If we examine the validity of the second order, without which the first order would have been ineffective to permit Judge MANTON to appoint receivers, we are forced to conclude that it lacked any jurisdictional foundation.

It was made pursuant to Section 23 of the Judicial Code, quoted in full above.

Judge WOOLSEY in his opinion states that he polled the eight judges of the District Court, and they all stated that there was no disagreement among them as to division of business at the time Judge MANTON's orders of August 25, 1932, or the orders appointing receivers, were made.

The only case interpreting Section 23 is *Case* v. *United States*, 14 Fed. (2d) 510 (C. C. A., 8th Circuit). In that case the two District Judges for the Eastern District of Oklahoma actually disagreed as to the division of business in said District, and of their own accord, submitted such disagreement to the Senior Circuit Judge of said Circuit, Judge SANBORN, who, thereupon, divided the business of the district between said judges.

Section 23 cannot be interpreted to mean, as it would have to be, to sustain the order of Judge MANTON, that a Senior Circuit Judge can designate himself a District Judge

for the sole purpose of acting upon a disagreement which is brought into being between himself, as such District Judge, and the appointed District Judges, consequent upon such designation. Section 23 contemplates that the Senior Circuit Judge should act as a peacemaker and compose the differences then existing between the appointed District Judges, and not that he himself should create such dissension.

The second order of Judge MANTON thus being void, as being in excess of any authority, he was without right to appoint receivers in violation of Rule 11-a of the General Rules of the District Court.

**(b) Considering the order of designation alone, it affirmatively appeared that there was no public interest which required such designation and, therefore, Judge Manton never became a District Judge.**

As we have observed, Section 18 of the Judicial Code permits a Senior Circuit Judge, "if the public interest requires" to designate and assign any Circuit Judge of a Judicial Circuit to hold a District Court within such Circuit.

In Judge MANTON'S first order he recites that the public interest requires that he be assigned to hold a District Court.

The Circuit Court of Appeals held that this recital was conclusive upon the Court that the public interest did require such designation. In reaching this conclusion we submit that the Court below was in error. For instance, in *State* v. *Kane*, 173 La. 35 (June, 1931), a statute conferred upon the district judge power to fix sessions of the court in a judicial district composed of more than one parish, and provided that, after fixing the date of such sessions no change in such date could be made within one year thereafter. The statute also provided that the fixing of such sessions should not affect the authority of the judge to hold

a session at any time in any parish in his district "whenever the public interest may require it". The judge designated by the district judge to hold such session changed the date of the beginning of such session from the third Monday of May to the first Monday of May, although the third Monday of May had been fixed by said district judge within less than a year from such change. In order to sustain such change, on the ground that the public interest required it, the judge making the same had to state the facts upon which he based his action and, as such facts were found sufficient to justify the change, it was held that a verdict in a criminal case rendered at a term of the court convened on said earlier date was valid.

Applying the principle of the above case that the evidence to sustain a finding of public interest can be considered, it appears that the order of designation of Judge MANTON was based upon a specific affidavit of one Quackenbush, the attorney for the Interborough, entitled "Affidavit Showing the Necessity of Individual Receivers" in which were set forth the reasons why in his opinion it was in the public interest that no receiver in the *Brake Shoe* case should be a trust company or any other corporation, but that the receiver or receivers should be an individual or individuals. Subsequent to the decision of Judge WOOLSEY, and before the decision of the Circuit Court of Appeals, Judge MANTON rendered an opinion, which is reported in 1 Fed. Supp. 820, (Advance Sheets for January 9, 1933), in which said Justice specifically refers to the above affidavit of James L. Quackenbush as the basis for his finding that the public interest required him to make the orders of August 25, 1932, and the order appointing receivers.

This affidavit of Quackenbush, and opinion of Judge MANTON, are referred to by the Court below, but, notwithstanding the contention of petitioner that the interest dis-

closed therein was not the kind of interest contemplated by the statute, the Court disregarded this point by stating that even so, the order conferred the statutory authority upon the designated judge. We contend that this conclusion is a complete *non sequitur.*

Petitioner maintains that, where it affirmatively appears that no public interest required Judge MANTON to designate himself, then the order designating himself was without statutory authority, and void, as he had never become a District Judge.

The Court below cited *People* v. *Supreme Court,* 220 N. Y. 487, upon the proposition that the Court could not inquire into the question whether the public interest required such designation, but that Judge MANTON'S recital to that effect was conclusive. In that case, however, the record was silent as to what public interest required the Governor to appoint an extraordinary term of court. Besides in that case the Court was asked to nullify an act of a coordinate branch of the Government, whereas here, the Court was requested to invalidate the act of a judge of one court who designated himself as judge of another court for the sole purpose of flouting its rules upon the suggestion of public interest.

Certainly the words "public interest" do not mean that the Senior Circuit Judge can make a designation for the purpose of controlling or dominating the business of the Court arbitrarily or whimsically, or because of any personal views which he may have—differing from the views of the District Judges—as to the handling of cases, or as to the wisdom of rules validly adopted. We contend that the broadest and most liberal interpretation would not include the right of a Senior Circuit Judge to name himself as a District Judge whenever he chose to disagree with the lower Court, or because he did not approve of a rule which

they adopted under proper statutory authority; surely there is no basis for such unlimited power; the very breath of the section is its danger; it calls for a reasonable construction.

In the case at bar the record is not silent as to what "public interest" motivated Judge MANTON in designating himself a District Judge, but it explicitly shows that such alleged public interest was the unjustified fear that individual receivers would not be appointed, since there was no court rule requiring the appointment of a corporate receiver in equity causes.

We have, therefore, the right to inquire whether such necessity created a public interest within the meaning of Section 18 of the Judicial Code, for it has been held that, when the record states the evidence, or makes an averment with reference to a jurisdictional fact, it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred.

> *Galpin* v. *Page*, 18 Wall. 350;
> *Old Wayne Life Assn.* v. *McDonough*, 204 U. S. 8, 17 (following *Galpin* v. *Page*, *supra*).

Moreover, the claimed necessity for appointment of individual receivers does not create a "public interest" within the meaning of the above section.

In *Pennsylvania Steel Co.* v. *N. Y. City Ry. Co.*, 221 Fed. 440, Judge LACOMBE analyzed the meaning of Section 18 of the Judicial Code in the light of the circumstances surrounding its passage, and reached the conclusion that the only two instances of a public interest which justified a Senior Circuit Judge to invoke said section were a congestion of business in the district court or business left unfinished by a Circuit Judge prior to the abolition of the Circuit Courts.

We submit that the question whether an individual receiver, rather than a corporate receiver, should be appointed

in a particular case affects chiefly the private interests of the particular defendant and its creditors and is only remotely a matter of public concern. If the construction contended for by the Court below is sound, then no matter on what pretext a Senior Circuit Judge designated himself a District Judge, such action could not be attacked, provided only such Senior Circuit Judge recited in the order designating himself that the public interest required such designation and, notwithstanding the assumption of such jurisdiction, as here, was for the sole purpose of overriding the rules of the District Court to which he thus appointed himself.

Such an interpretation would make a Senior Circuit Judge an autocrat who could arbitrarily take away the power of a duly appointed District Judge, if for any reason sufficient to such Senior Circuit Judge he declared that public interest required such action. Such judge would under such a view have more power than the President of the United States to whom is committed the appointment of District Judges, for, if such Senior Circuit Judge could thus appoint himself a District Judge for a particular case, he could under the language of said section designate another Circuit Judge for the same purpose and any Circuit Judge could likewise designate himself for that purpose, so that it would be possible for the Circuit Judges to completely usurp the powers of the District Court, if they in their uncontrolled discretion deemed it advisable to do so. The interpretation given to said section by the Court below thus leads to a *reductio ad absurdum.*

However the question would have been decided if the record had been silent as to the nature of the alleged public interest, here the record is not silent on this point, and when we consider the reason given for the designation of Judge MANTON of himself as District Judge, as we have the

right to do under the above authorities, we find that there was no public interest, as distinguished from a private interest, within the meaning of Section 18, which justified such designation, and, therefore, such appointment was without statutory authority and void.

**(c) No application having been made to the Judge assigned to the motion part of the Court to appoint receivers, there was no evidence that a corporate receiver might be appointed and hence, no public interest shown justifying a violation of Rule 11-a.**

We have shown by the authorities above cited, that where it affirmatively appears that no public interest required Judge MANTON to assume the power of appointing receivers, such appointment lacked a jurisdictional basis. Assuming even that the public interest required the appointment of individual receivers instead of a corporate receiver, it plainly appears from Judge WOOLSEY's opinion, and the bill of complaint, that no request was made of Judge PATTERSON, who was assigned to the motion part of the Court to appoint receivers, and hence it cannot be said that he would have appointed a corporate receiver, there being no rule of the District Court which called for the appointment of a corporate receiver in equity causes. Without a showing that Judge PATTERSON intended to appoint a corporate receiver, there was no public interest, even on the theory of counsel for the Interborough, which required Judge MANTON to act.

## POINT II.

**Rule 11-a was not merely a directory rule and hence a violation thereof rendered the appointment of receivers *coram non judice*.**

Rule 11-a was passed in pursuance of Section 23 of the Judicial Code, above cited, which permits district judges, in districts having more than one judge, to agree upon a division of business. They did so agree by virtue of Rule 11-a.

It has been held that even a rule of a District Court as to mere procedure has the force of a statute.

*Weil* v. *Neary*, 278 U. S. 160.

Here Rule 11-a having been made in pursuance of a specific statute, and not merely in pursuance of the general rule-making power conferred on the District Courts by Section 731, Title 28 of the United States Code, itself had the force of a statute, and its violation rendered Judge MANTON'S order void.

*Case* v. *United States*, 14 Fed. (2d) 510 (*supra*).

In that case after Judge SANBORN divided the Eastern District of Oklahoma into two divisions, a trial presided over by a Judge in a different district than the one to which he had been assigned by Judge SANBORN, nullified the entire proceeding.

## POINT III.

**The Court below erred in holding that petitioner could attack Judge Manton's orders only by intervention in the *Brake Shoe* case.**

The Court below admitted that, if Rule 11-a deprived Judge MANTON of jurisdiction to proceed under the order designating him to hold the District Court, the petitioner could maintain an independent bill to attack Judge MANTON'S orders. The Court, however, held that such rules were merely directory and did not therefore deprive Judge MANTON of jurisdiction. For that reason the Court held that the attack upon Judge MANTON'S orders should have been made by intervention in the *Brake Shoe* case.

As the object of such intervention, however, was to impeach Judge MANTON'S decrees in entertaining the *Brake Shoe* bill, and also appointing receivers, such result could not be accomplished by intervention.

*Rule 37, Equity Rules of Supreme Court of United States;*

*U. S.* v. *California Canneries*, 279 U. S. 553, and cases cited;

*Central Republic Bank & Trust Co.* v. *Caldwell*, 58 Fed. (2d) 721 (C. C. A., 8th Circuit).

It has been specifically held that the better practice in attacking a decree to which the party making such attack is a stranger, is by an independent bill.

*Compton* v. *Jesup*, 68 Fed. 263 (C. C. A., 6th);

*Morgan's Co.* v. *Texas Central Ry.*, 137 U. S. 171, at page 201;

*Hopkins* v. *Lancaster*, 254 Fed. 190, 193 (cited with approval in *U. S.* v. *California Canneries, supra*);

*State Trust Co.* v. *Kansas City P. & G. R. Co.*, 120 Fed. 398, 407 (cited with approval in *U. S.* v. *California Canneries, supra*).

## POINT IV.

**The *Johnson* suit having been promptly filed, petitioner was in a position to attack the consent decree in the *Brake Shoe* case based upon a bill of a simple contract creditor.**

In *Harkins* v. *Brundage*, 276 U. S. 36, the practice of obtaining a friendly receivership by consent upon a bill of a simple contract creditor, was disapproved. In the case at bar, the complainant in the *Brake Shoe* case was a simple contract creditor and the receivership was a "friendly" one obtained by consent of the Interborough. That it was friendly appears from the fact that the solicitors appointed for the receivers of the Interborough had represented said Interborough and its affiliated company as counsel within less than a year prior to the receivership and that one of the receivers of said Interborough was a member of said firm of solicitors at the time of his appointment.

See also:

*Michigan* v. *Michigan Trust Co.*, 286 U. S. 334.

Coupled with the fact that the consent decree was made at the instance of a simple contract creditor, among other reasons set forth in the main and supplemental bills, petitioner contends that the close relationship of the solicitors of the receivers to the Interborough, is sufficient to show

that the entire proceeding was a collusive one, the orders in which were properly set aside by Judge WOOLSEY (R. 70, 72, 74, 75, 24, 25, 26).

## CONCLUSION.

**The petition for a writ of certiorari should be granted.**

Dated, New York, January 15, 1933.

Respectfully submitted,

ALFRED C. B. MCNEVIN,
*Counsel for Petitioner.*

CHARLES FRANKLIN,
HERBERT GOLDMARK,
LEONARD H. GOLDENSON,
*Of Counsel.*

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No. 721

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# Supreme Court of the United States

OCTOBER TERM—1932.

BENJAMIN F. JOHNSON,

Petitioner,

*against*

MANHATTAN RAILWAY COMPANY, *et al*,

Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

Respondent,

*against*

INTERBOROUGH RAPID TRANSIT COMPANY,

Respondent.

IN THE MATTER

*of the*

INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

PETITION AND

**BRIEF OF INTERVENOR, LILLIAN BOEHM, IN SUPPORT OF PETITION OF BENJAMIN F. JOHNSON FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.**

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No.

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1932

BENJAMIN F. JOHNSON,
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*against*
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THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
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INTERBOROUGH RAPID TRANSIT COMPANY,
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IN THE MATTER
*of the*
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RECEIVERSHIP PROCEEDINGS.

## BRIEF OF INTERVENOR, LILLIAN BOEHM, IN SUPPORT OF PETITION OF BENJAMIN F. JOHNSON FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

### Intervenor's Status.

The intervenor, Lillian Boehm, duly intervened as party plaintiff in the suit of Benjamin F. Johnson, first above entitled, in which the plaintiff now petitions this Court for a writ of certiorari (p. 137). The intervenor adopts his petition and joins in his prayer.

## Summary of the Facts.

On June 30th, 1932, Rules 1a and 11a of the General Rules of the District Court for the Southern District of New York were adopted by all of the eight judges of the District. They provide:

> "1a. Any Judge designated to sit in the District Court for the Southern District of New York shall do such work only as may be assigned to him by the Senior District Judge."
>
> "11a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes ( * * * ) shall be made to the judge assigned to hold the Bankruptcy and Motion Part of the business of the Court, *and to no other judge.*" (p. 702). (Our italics.)

They were adopted pursuant to Sections 731 and 27, Title 28, U. S. Code.

Section 731 grants the district courts statutory power to enact rules to "regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

Section 27 empowers the district courts to provide for the division of their business. It reads:

> "In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; *but in case they do not so agree*, the senior circuit judge of the circuit in which the district lies, shall make all *necessary* orders for the division of business and the assignment of cases for trial in said district." (Our italics.)

On August 25th and 26th, 1932, Judge Patterson, who had been duly assigned to hold the Motion Part pursuant to agreement of the District Judges, was sitting in Court or in Chambers functioning as Judge of the Motion

Part, ready to deal with any applications for equity receiverships (pp. 717, 718).

On August 25th, 1932, counsel for Interborough Rapid Transit Company, and its creditor, American Brake Shoe & Foundry Company, attended before Judge Manton, Senior Circuit Judge, in his Chambers, and requested him to designate himself to hold a District Court so that he could entertain an application for the appointment of receivers in a creditor's action, about to be brought. They presented an affidavit of Interborough's counsel, entitled in that action, stating as the ground for this unusual request his fear that Judge Patterson might appoint a trust company, rather than an individual, as receiver (p. 175. See also *American Brake Shoe & F. Co.* v. *Interborough R. T. Co.,* 1 Supp. Fed. 820, Manton, J.).

Thereupon, on the same day, Judge Manton signed two orders. The first order recited that the public interest required that he be designated and assigned as Circuit Judge to hold the District Court within such Circuit beginning on that day, and ordered his designation and assignment as such, particularly to hear all applications in the Brake Shoe suit not then commenced (p. 177). The order recited as its authority Section 22, U. S. Code, which provides:

> "The Chief Justice of the United States or the Circuit Justice of any judicial district, or the Senior Circuit Justice thereof, may, *if the public interest requires*, designate or assign any circuit judge of a judicial circuit to hold a District Court within such circuit." (Our italics.)

The second order declared that as a Circuit Judge designated to hold a District Court, he did not agree with the other Judges of the said District Court as to the existing division of business therein, and as Senior Circuit Judge ordered that for a period of the next

thirty days all applications for the appointment of receivers in equity causes in that district might be made not only to the District Judge designated to hear all such applications pursuant to Rule 11a, but also to himself (p. 178).

These two orders, bound together under one cover, and in reality constituting but one order, were filed on the following day, August 26th, 1932, in the Clerk's Office (p. 715).

On the same day, August 26th, the American Brake Shoe & Foundry Co. filed a creditor's bill upon a simple contract claim for $27,000 against the Interborough, praying for an equity receivership (pp. 153, 170). At that time Interborough had almost $5,000,000 in bank and was well able to pay this claim (fols. 222, 224, 232). On the same day Judge Manton, upon this bill, and Interborough's consent, signed an order appointing receivers of the Interborough (pp. 180, 184, 705, 715).

No application was made to Judge Patterson on either August 25th or 26th, though he was the duly assigned judge sitting in the Motion Part, and was actively functioning as such on both days. No request was made by Judge Manton as District Judge to Judge Knox as Senior District Judge, under Rule 1a, for an assignment of the Court's business, or for an assignment specifically to hear the Brake Shoe receivership application (pp. 717-718).

A poll of all the District Judges disclosed that there was no disagreement among them as to the division of business (p. 717).

Subsequently, Judge Manton extended the receivership to the Manhattan Railway, upon its application and consent (p. 196).

On September 21st, 1932, the petitioner, Johnson, a Manhattan stockholder, filed his bill of complaint in a representative stockholders' action joining as defendants all the parties in the Brake Shoe case, alleging, among

other things, that the orders of Judge Manton, particularly the order of designation, order of division of business, and order appointing receivers, were wholly void and beyond his jurisdiction, since he lacked power to designate himself District Judge to hear the Brake Shoe case and to order the division of business and had violated Rules 1a and 11a in appointing receivers. The bill prayed that these and all subsequent orders of Judge Manton in the Brake Shoe case be vacated and set aside, and that independent receivers of Interborough and Manhattan be appointed (pp. 13, 49, 69).

On September 21st, 1932, Lillian Boehm, a secured creditor of Interborough, and stockholder and bondholder of Manhattan, by leave granted, intervened as party plaintiff in the Johnson suit (pp. 137, 80).

On October 18th, 1932, Judge Woolsey, on motion of Johnson and Boehm, vacated Judge Manton's orders appointing receivers upon the ground that Judge Manton's acts in the District Court were *coram non judice* (pp. 725, 694-721, *Johnson* v. *Manhattan Ry. Co., et al,* 1 Fed. Supp. 809).

On appeal to the Circuit Court of Appeals, Judge Woolsey's order was reversed (*Johnson* v. *Manhattan Ry. Co.*, 61 Fed. (2d) 934). Review of this determination is now sought.

## Importance of the Case.

This case involves questions of Federal law of prime importance to the public in the administration of justice not only in the District Court, Southern District of New York, but in all the district courts throughout the country. As Judge Woolsey said in his opinion, it "raises important questions of Federal Court administration of first impression" (p. 699). The uncertain state of the law, and the need for definite and authoritative judicial settlement is implicit in Judge Hand's opinion on appeal.

Sections 22 and 27 of the U. S. Code have not yet been construed by this Court. Whether Rules 1a and 11a of the District Court (which Judge Manton violated) are mandatory, rendering his acts in violation thereof void for lack of jurisdiction and power, or are merely directory, calls for final judicial review.

The independence of the District Court in matters of original jurisdiction is at stake. Whether a senior circuit judge, for the purpose of having certain judicial business of the District Court conducted according to his personal views, may inject himself into the district court as a district judge, regardless of public interest or necessity, and then under pretext of dissension among the district judges which he himself creates, assign to himself this specific judicial business, in defiance of the district court's own rules for the conduct and division of its business, presents a problem far-reaching in its scope.

Involved in this case are the rights of the stockholders and bondholders of Interborough and Manhattan, representing a capitalization and investment of over three hundred million dollars and embracing the elevated and subway transportation systems of the City of New York, the rights of the City to whom Interborough is indebted for almost two hundred million dollars, the interests of the vast traveling public, as well as the rights of all persons dealing with the Interborough and Manhattan receivers, the validity of whose acts is in doubt because of their questioned jurisdictional foundation.

Because of the vital questions involved herein, this case has since its inception drawn the sustained interest and attention of the Bar and the public press, and has been extensively editorialized both in the daily prints and in legal publications.

The unusual and circuitous procedure here adopted for the appointment of receivers has tended to cast doubt and reflection in the public mind upon the administra-

tion of justice in the federal courts. The decision of the Court below has not dispelled it. This departure from the usual and accepted course of judicial proceedings in the appointment of equity receivers calls for the exercise of this Court's power of supervision.

## Specifications of Error.

The Court below erred in the following respects:

1. The Court held that Judge Manton had power to designate himself to hold a District Court whereas, inasmuch as it affirmatively appeared that the public interest did not require such designation, it should have determined that he was without such power, and that his consequent acts as designated District Judge were *coram non judice.*

2. The Court should have held that Section 18 of the Judicial Code did not empower Judge Manton to designate the case which he was to hear, or the part in which he was to sit, inasmuch as it does not provide for any selective designation or any focusing of judicial activity in the District Court.

3. The Court should have held that inasmuch as there was no disagreement among the District Judges as to the division of business, Judge Manton, as Senior Circuit Judge, had no power to make an order for the division of business assigning himself as District Judge to hear applications for the appointment of receivers, and, consequently, his order for the division of business and his orders appointing receivers were without authority in law and void.

4. The Court erred in holding that Rules 1a and 11a were not mandatory but merely directory, and that

Judge Manton's violation of these rules in attempting to take jurisdiction of the Brake Shoe case was not a jurisdictional defect, but only reversible error.

5. The Court erred in holding that Judge Manton's jurisdiction to act in the Brake Shoe case and to appoint receivers in violation of Rules 1a and 11a, could be attacked only by the petitioner's intervention in the Brake Shoe case, and not by independent bill.

## POINT I.

**Judge Manton had no power to designate himself to hold a District Court inasmuch as it affirmatively appears that there was no public interest which required such designation. His acts as such designated judge were accordingly coram non judice.**

The statute expressly provides that the Senior Circuit Judge may designate a circuit judge to hold a district court *if the public interest requires* (Section 18, Judicial Code). Unless there is public interest in fact, a designation would be an arbitrary and capricious act. The mere recital cannot be conclusive when challenged. There must be some basis in fact to support it.

Originally this section provided for designations if *in the judgment* of the designating judge, the public interest required such designation, as Sections 13, 16 and 17, Judicial Code, still do. Section 18, however, was amended to its present form on September 14th, 1922, by the omission of the words "whenever in the judgment of the senior circuit judge." Thus the designation under Section 18 became dependent upon the existence in fact of a public interest.

Unless the public interest in fact required Judge Manton to designate himself to hold a District Court, his designation order was without power and void.

By Judge Manton's opinion in the form of instructions to the acting receivers, rendered after Judge Woolsey's decision, but before the appeal, it clearly appears that the public interest he expressed in his order of designation was based solely upon the fear that Judge Patterson, the judge duly assigned to, and holding the Motion Part, might appoint a trust company as receiver rather than individual receivers (*Amer. Brake Shoe & F. Co.* v. *Interborough R. T. Co.*, 1 Fed. Supp. 820).

This fear was utterly unfounded, for, as Judge Manton himself stated, he did not inquire of Judge Patterson before making the orders of designation whether he would appoint an individual, or trust company, as receiver. Furthermore, there is no District Court rule requiring the appointment of a trust company as receiver in equity cases. The rule requiring trust company appointment is solely a bankruptcy rule. This is not the kind of public interest contemplated by the statute as the requisite for designation. It is a private interest; the public is but remotely concerned.

If this be public interest, then a senior circuit judge doubting the ability, experience, discretion, or wisdom of any district judge to conduct a particular cause, or differing with the district judges in his views concerning the transaction of judicial business of the District Court, might designate himself as district judge, step in and take unto himself the particular cause or business, and dispose of it as he believes the district judge duly assigned thereto ought to. To so hold, would lead inevitably to judicial confusion and chaos. It would destroy the independence of the district courts.

Section 18 of the Judicial Code, providing for designation of a circuit judge, was enacted in connection with the abolition of the Circuit Court, and the transfer of its business to the District Court. Its purpose was to permit Circuit Judges to complete unfinished business rather than require the District Judges to take up unfinished

work *de novo,* and to assist the District Judges when overburdened with a congestion of business. The public interest contemplated is clearly evidenced by the purpose of the statute.

> *Pennsylvania Steel Co.* v. *New York City R. R.,* 221 Fed. 440 (Lacombe, J.).

The Court below erred in holding the recital of public interest conclusive. In *State* v. *Kane,* 173 La. 35 (1931), where the statute empowered the judge to fix sessions of the court, and provided that after such fixing no change could be made within a year thereafter, but that the fixing of such sessions should not affect the judge's authority to hold sessions at any other time whenever public interest required, a judgment rendered at a changed session was held valid only after a finding of sufficiency of the facts upon which the judge concluded that public interest required the change in session.

If the mere statement of public interest is conclusive in the order of designation, notwithstanding that the factual basis expressed clearly negatives the existence of any public interest, then a senior circuit judge could designate himself a district judge at any time for the purpose of autocratically meddling and interfering with the administration of the District Court, under the mere pretext of "public interest," wholly unfounded.

## POINT II.

**Judge Manton under Section 18, Judicial Code, had no power to designate the case which he was to hear or the part of the court in which he was to sit.**

Section 18, Judicial Code, does not provide for any selective designation or any focusing of judicial activity in the District Court. Upon designation, a Circuit Judge

does not acquire any greater powers than the duly appointed District Judges. He cannot roam at will in the District Court choosing such judicial business as his whim or fancy may dictate. He must conform to the rules of that court, and transact the business assigned to him in accordance with its rules, like any other district judge.

## POINT III.

**Since there was no disagreement between the district judges with respect to the division of business in the District Court, Judge Manton as senior circuit judge had no power to order that applications for the appointment of receivers might be presented to him as district judge.**

Judge Manton, having designated himself to sit as a District Judge, and desirous of hearing the Brake Shoe application for receivership, found Rule 11a an obstacle in his path.

Section 27, U. S. Code provides that *if the District Judges do not agree* upon the division of business, the Senior Circuit Judge shall make all *necessary* orders for the division of business in said district. Judge Woolsey's poll of the eight judges disclosed that there was in fact no disagreement among them. This prerequisite being absent, Judge Manton, as Senior Circuit Judge, had no power to make an order for division of business. None was necessary.

To circumvent Rule 11a, Judge Manton, sitting as District Judge, thereupon declared that he disagreed with the other District Judges as to who should hear applications for receivers in equity causes. Under the guise of such disagreement, he as Senior Circuit Judge, then made his order dividing the business of the District Court, and ordering applications for the appointment

of receivers to be made before him, as well as to the judge duly assigned to sit in the Motion Part.

This order was without jurisdictional foundation. The role assigned to the Senior Circuit Judge under Section 27 was that of peacemaker to compose existing differences among the District Judges, not the role of troublemaker to inject dissension into District Court harmony. Neither Sections 18 nor 27 contemplate a designation for the purpose of creating disagreement with the District Judges, when in fact harmony exists, so that the Senior Circuit Judge by such self-created dissension may arrogate to himself and control the District Court's business.

Furthermore Judge Manton's designation did not make him a District Judge, but only gave him authority as Circuit Judge to hold a District Court.

*Craig* v. *Hecht*, 263 U. S. 255, 274.

He therefore had no such status in the District Court as to give him the right to participate (and disagree) in the division of business or rule-making of the District Court.

## POINT IV.

**Rules 1a and 11a having the force of statute are mandatory and not directory. Judge Manton's acts in the Brake Shoe Case in direct violation of these rules were jurisdictionally defective. He was without power to hear the application.**

Rules 1a and 11a have the force of law and the juridical status of statute.

*Rio Grande Irrigation Co.* v. *Gildersleeve*, 174 U. S. 603, 608;
*Weil* v. *Neary*, 278 U. S. 160.

These Rules are mandatory. Rule 11a provides that applications for the appointment of receivers shall be made to the judge assigned to the Motion Part "*and to no other judge.*" The Rule goes to jurisdiction. A judge not assigned to the Motion Part has no authority to hear such applications. The test of jurisdiction is the power to hear and determine. It is the right to decide.

*United States* v. *Arredondo*, 6 Pet. 691;
*Phebus* v. *Search*, 264 Fed. 407 (C. C. A. 8th).

Judge Manton was not assigned to the Motion Part, and was therefore without power to hear and determine the application for receivers in the Brake Shoe case. Without such jurisdiction his acts were null and void.

Proceedings of a judge at a time or place other than that prescribed or authorized by law, are *coram non judice*, and void.

*Case* v. *United States*, 14 Fed. (2d) 510;
*McGlashan* v. *United States*, 71 Fed. 434 (C. C. A. 7th);
*In re Steele*, 161 Fed. 886.

In *Case* v. *United States*, 14 Fed. (2d) 510, the two District Judges appointed to one District disagreed upon the division of work. The Senior Circuit Judge thereupon divided the District into two divisions and assigned one Judge to each division. The trial by one judge of a person indicted for offenses committed in the other division was held not a mere irregularity, but wholly without authority and void.

It is well established that an act by a judge in violation of a mandatory rule of court is void.

*In re Rogers Pyatt Shellac Co.*, 43 Fed. (2d) 863 (S. D. N. Y.) affd. 51 Fed. (2nd) 988;
*Boyer* v. *Boyer*, 129 App. Div. 647 (N. Y.).

Judge Manton had no power to ignore or dispense with Rule 11a. It could be modified, waived, or dispensed with only by those who adopted it, the eight judges of the District Court.

*Halter* v. *Wade*, 85 Colo. 121, 124;
*Carp* v. *Kaplan*, 251 Mass. 225, 228.

## POINT V.

**Judge Manton in hearing the application in the Brake Shoe Case, was neither a de jure nor a de facto judge. There cannot be a de facto judge acting in the court in which a de jure judge is present and functioning.**

Judge Patterson was the *de jure* judge regularly assigned and sitting in the Motion Part of the District Court to hear applications for the appointment of receivers at the time the application in the Brake Shoe case was made to Judge Manton.

Judge Manton's orders appointing receivers could not therefore be validated on the theory that if he was not a Judge *de jure*, he was at least a Judge *de facto*, for it is well settled that there cannot be a *de facto* judge when there is a *de jure* judge in actual performance of the duties of the office.

*33 Corpus Juris*, 925;
*People* v. *Brautigan*, 310 Ill. 472, 479;
*Commonwealth* v. *Bush*, 131 Ky. 384, 393;
*United States* v. *Alexander*, 46 Fed. 728.

## POINT VI.

**The Court below erred in holding that Judge Manton's jurisdiction to act in the Brake Shoe case and power to appoint receivers could be attacked only by intervention in the Brake Shoe case and not by independent bill.**

An intervention must be subordinate to, and in recognition of, the propriety of the main proceeding.

> *Rule 37,* Rules of Equity Practice;
> *United States* v. *California Canneries,* 279 U. S. 553.

An intervenor cannot seek the aid of the court, and at the same time attack its jurisdiction in the cause in view of Rule 37.

> *Union Trust Co.* v. *Jones,* 16 Fed. (2nd) 236 (C. C. A.).

Intervention to challenge jurisdiction or to inaugurate litigation outside the scope of the original suit is not permissible.

> *Board of Drainage Comm.'s* v. *Lafayette S. Bank,* 27 Fed. (2nd) 286 (C. C. A.).

The Johnson and Lillian Boehm bills whose prayer was to vacate Judge Manton's receivership orders, constituted a direct attack upon his jurisdiction and power by the only method available to them, that of independent bill. They were not parties to the Brake Shoe case, and had no opportunity to make proper objection to Judge Manton's jurisdiction prior to the making of the orders. The method of appointment of receivers in the

Brake Shoe case foreclosed Johnson and others similarly situated, from recourse in that proceeding to deny or attack Judge Manton's power. Leave to intervene could only be obtained at the price of recognition of his authority, thus defeating at the outset the very purpose of the intervention.

Where a stranger to the cause seeks to impeach the jurisdiction, the remedy afforded him is by original bill.

> *Hopkins* v. *Lancaster,* 254 Fed. 190, 193;
> *State Trust Co.* v. *Kansas City P. & G. R. Co.,* 120 Fed. 398, 407.
> (Both cases cited with approval in *United States* v. *California Canneries,* 279 U. S. 553.)

The Court below impliedly admitted that Judge Manton had violated the rules of the District Court, and that if Rule 11a were mandatory and deprived him of jurisdiction, the jurisdictional attack could be made by independent bill. It held, however, that the Rule was only directory and did not go to jurisdiction, and that the attack therefore should have been by intervention in the Brake Shoe case before Judge Manton himself.

In this the Court below erred. Since the object of Johnson and Lillian Boehm was to impeach Judge Manton's orders in the Brake Shoe case by challenge of his jurisdiction, it could not be accomplished by intervention.

The Court below further held in error that the complainants might have appeared before Judge Manton on the return day of the order to show cause for the continuance of the receivership in the Brake Shoe case, and there urged their objection to his jurisdiction. The complainants, however, were not parties to the Brake Shoe case, and had no notice of the application. If they intervened, they could not attack the jurisdiction in that cause. If they attempted without intervening to urge their objection, upon its denial by Judge Manton (a

result readily to be presumed), they would be left without right of appeal or other recourse, since they were not parties and had acquired no standing in the action.

## POINT VII.

**The petition of Benjamin F. Johnson for a writ of certiorari should be granted.**

Dated, New York, February 11th, 1933.

Respectfully submitted,

BOEHM & ZEIGER,
Counsel for Intervenor,
Lillian Boehm.

FILE COPY

No. 711.

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CHARLES ELMORE

# Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. 711 and 721.

BENJAMIN F. JOHNSON,

*Petitioner,*

*vs.*

MANHATTAN RAILWAY COMPANY, *et al.*

LILLIAN BOEHM,

*Petitioner,*

*vs.*

MANHATTAN RAILWAY COMPANY, *et al.*

*On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.*

## BRIEF OF PETITIONER BENJAMIN F. JOHNSON.

CHARLES FRANKLIN,
ALFRED C. B. McNEVIN,
HERBERT GOLDMARK,
LEONARD H. GOLDENSON,
*Counsel for Petitioner Benjamin F. Johnson.*

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# Supreme Court of the United States

OCTOBER TERM, 1932.

No. 711.

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BENJAMIN F. JOHNSON,

*Petitioner,*

vs.

MANHATTAN RAILWAY COMPANY *et al.*,

*Respondents.*

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No. 721.

LILLIAN BOEHM,

*Petitioner,*

vs.

MANHATTAN RAILWAY COMPANY *et al.*,

*Respondents.*

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*On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.*

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## BRIEF OF PETITIONER BENJAMIN F. JOHNSON.

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### OPINIONS BELOW.

The opinion of the Circuit Court of Appeals, per L. Hand, *C. J.*, is reported in 61 Fed. (2d) 934. It also appears in the record at pages 1024-1035.

The opinion of the District Court, per Woolsey, *D. J.*, is reported in Federal Supplement, Vol. 1, issued January 9, 1933, at pages 809-820. It also appears in the record at pages 694-721.

## *Statement.**

On September 21, 1932, the petitioner Benjamin F. Johnson, a citizen of Kentucky, filed in the district court, an equity bill, in his derivative right as a stockholder of Manhattan Railway Company against American Brake Shoe and Foundry Company, Interborough Rapid Transit Company, and all defendants who, at that time, were parties to the equity receivership suit entitled *American Brake Shoe and Foundry Company* against *Interborough Rapid Transit Company* (R. 13-15). The Interborough receivership had been extended to Manhattan Railway Company and a separate receiver was appointed for it (R. 196).

The complainant in the *Brake Shoe* cause was a simple contract creditor to the extent of $27,500 (R. 164). The averments in petitioner's bill and supplemental bills show that the *Brake Shoe* case was prearranged and collusive (R. 24-6, 31, 35-7, 40, 43-5, 57, 59-62, 70-4, 120). It was alleged in petitioner's bill that the *Brake Shoe* suit was brought in disregard of the effective district court rules governing equity causes; that Honorable Martin T. Manton, Senior Circuit Judge, who entertained the *Brake Shoe* bill, and appointed receivers therein, was without authority to act officially in said cause (R. 15-22); that the appointment both of the receivers, and of their solicitors, was irregular and improper, because of their past relationship to the Interborough and Manhattan companies (R. 24-6, 31, 37, 40-5, 57, 70-3, etc.); also that the two orders of Judge Manton designating himself a district judge to take charge of the

* Italics throughout this brief ours.

receiverships, under and by virtue of Sections 18 and 23 of the Judicial Code, were void, because there had been no disagreement among the eight district judges warranting his intervention (R. 17); nor was there any public as distinguished from a private interest involved warranting such intervention (R. 19). The prayer of the bill was to vacate the receivership orders, the designations, for the appointment of disinterested receivers of the properties; also for the designation of independent counsel, for determination of the rights of Manhattan Railway Company, for an accounting, etc. (R. 42-48).*

The filing of petitioner's bill was preceded by an order of September 20, 1932, made by District Judge Francis G. Caffey upon Johnson's petition granting leave to file the suit (R. 7). The jurisdiction of the district court over Johnson's cause depended upon diversity of citizenship of the parties (R. 13-15).

Johnson filed two petitions supplemental to his original bill (R. 49-66 and R. 69-79) setting forth certain additional grounds to show that it was the purpose of the parties to the *Brake Shoe* cause to have the receiverships

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* It is suggested in the opinion of the lower court that appellant's interest is limited to a change of judge and receivers; the opinion has apparently disregarded the allegations of the bill, and of the two supplemental petitions charging that the receivership proceedings were entirely void; also that as said receivers and their solicitors were appointed in a collusive proceeding they would not adequately protect the interests of petitioner, and those similarly situated. It was suggested on page 20 of the main brief filed in this Court opposing the writ, that the reason for appellant's derivative suit has disappeared. This is incorrect. The danger of having the entire equity in the stock of Manhattan Railway Company wiped out and its Second Mortgage Bonds is still very real. And while it is true, as stated at pages 20 and 21 of said brief, that the defaults in the payment of interest on Manhattan Railway Consolidated 4% Bonds have been cured, counsel failed to inform the Court that such payment was not ordered made until the day before expiration of the 60-day period of grace allowed under said mortgage before foreclosure proceedings could be instituted; and that the payment was made only after protracted hearings before a Special Master appointed for that purpose. There is at present pending an application by the receivers to be relieved from the payment of the April 1, 1933 interest on the first mortgage bonds.

in friendly hands, and asked to have vacated Judge Manton's decree of September 28, 1932,

> "continuing the receiverships *pendente lite*, and providing that the 1932 equity term of this court be extended until the termination of the proceedings under the receiverships; or, in any event, for a period of three years from September 28, 1932, with leave to apply for further extension thereof, and with reservation of full jurisdiction in the premises" (R. 64, 706-7).

A number of parties intervened in appellant's suit, including one Lillian Boehm (R. 80, 145), so that, when the cause came up for argument upon a rule to show cause before district judge John M. Woolsey on October 4, and 6, 1932, the value of the Manhattan Railway stock represented at said hearings amounted to approximately $15,000,000 (R. 830).*

## *Proceedings Below.*

After a hearing, District Judge Woolsey holding the motion part of the court, vacated the decrees of Judge Manton in the *Brake Shoe* case. He declined to vacate the designations (which were entitled in the Circuit Court of Appeals) as beyond his jurisdiction; and postponed the appointment of substitute receivers pending the possibility of appeal (R. 698). Judge Woolsey upon his own motion directed consolidation of the appellant's cause with the *Brake Shoe* cause (R. 697, 710-711). 1 F. Supp. 809.

The United States Circuit Court of Appeals reversed the above mentioned orders.

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* In the main brief in opposition to appellant's petition for writ of certiorari, filed in this Court, by counsel for the receivers of Interborough and others, it is stated at page 20 that, at the annual meeting of the stockholders of the Manhattan Railway Company held in November 1932, the board of directors of that Company was displaced. Said statement is correct. The Manhattan Railway Company is only nominally a respondent on this appeal. It is in entire sympathy with the position of the petitioner.

This cause comes to this Court upon a writ of certiorari granted March 20, 1933 (R. 1049).

## *The Principal Questions Involved.*

At the time receivers were appointed for the Interborough Company (August 26, 1932), the following Court Rules of the District Court were in force:

> "All applications for the appointment of receivers in equity causes * * * shall be made to the Judge assigned to hold the motion part of the business of the Court and to no other Judge" (Rule 11-a, General Rules of U. S. District Court).
>
> "Any Judge designated to sit in the District Court for the Southern District of New York shall do such work only as may be assigned to him by the Senior District Judge" (Rule 1-a, General Rules of U. S. District Court).

These rules were adopted unanimously by the district judges of the Southern District of New York and are still in effect. They have been recognized and obeyed, except in a few cases where the Senior Circuit Judge deemed it unwise to comply therewith. The Interborough receivership is one of the exceptional causes wherein, for instance, Rule 11-a was recognized as valid by Judge Manton, but declared inoperative as to him (R. 179).

It is conceded that on August 26, 1932, when the first of the receivership orders was made, District Judge Robert P. Patterson was the Judge duly assigned to hold the motion part of the business of the district court; that he was present in the court room, or in chambers, ready to receive and act upon applications for equity receiverships; and that the papers in the *Brake Shoe* case had not been presented to him (R. 717-8). The opinion of the Circuit Court of Appeals states that Judge Manton, in taking jurisdiction of the *Brake Shoe* case, and appointing receivers therein, had

no intention of being bound by the above quoted rules (R. 1028).

The plan followed by the parties to this exceedingly friendly receivership, in order to circumvent the established rules of the court, was to present to Judge Manton (1) the bill of a simple contract creditor; (2) answer of the Interborough admitting its averments; and (3) an affidavit of James L. Quackenbush, an officer of the Interborough, designated "*Affidavit Showing Necessity of Individual Receivers*" (R. 175-176). The opinion below says regarding the said affidavit:

> "On August 25, 1932, the attorney for the Interborough Rapid Transit Company verified an affidavit in a suit, not yet begun, entitled *American Brake Company* v. *Interborough Rapid Transit Company*, alleging that, in his judgment, it would be undesirable to have a trust company appointed receiver in the cause and giving his reasons" (R. 1024-5).

The only trust company Mr. Quackenbush could have had in mind was the Irving Trust Company. The only rule that requires its appointment as receiver is Bankruptcy Rule 27, *which is expressly limited to bankruptcy causes.* Judge Woolsey pointed out that there was no rule requiring the appointment of the Irving Trust Company in equity causes, saying that the District Judges were free in such cases to appoint individual receivers (R. 2518).

The opinion below says with regard to the "Affidavit Showing Necessity of Individual Receivers":

> "Whether this was acted upon by the Senior Circuit Judge for the Second Circuit does not appear in the record."

In directing the Receivers to appeal from Judge Woolsey's opinion Judge Manton wrote an opinion explaining his action (1 Fed. Supp. 820, 826-7). This plainly shows that

said affidavit was the Senior Circuit Judge's reason for invoking Sections 18 and 23 of the Judicial Code (Sec. 22 and Sec. 27, U. S. Code Tit. 28), under which he issued the two orders whereby he designated himself a district judge to take charge of the Interborough-Manhattan receiverships. Both of said designation orders were dated August 25, 1932 (R. 177, 179). District Judge Woolsey, in his opinion observed that said orders were bound together under one cover and were filed simultaneously with the bill, answer and "public interest" affidavit in the Clerk's office on August 26, 1932 (R. 175, 705, 715).

Taking the Quackenbush affidavit as a foundation, the Senior Circuit Judge first invoked Section 18 of the Judicial Code, which provides:

> "The Chief Justice of the United States, or the circuit justice of any judicial circuit, or the senior circuit judge thereof, may, *if the public interest requires*, designate and assign any circuit judge of a judicial circuit to hold a district court within such circuit * * *
>
> During the period of service of any judge designated and assigned under this chapter, he shall have all the powers, and rights, and perform all the duties, of a judge of the district, or a justice of the court, to which he has been assigned."

and made an order to be hereafter referred to as the "public interest order" to be found in the margin.*

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* "WHEREAS, the undersigned, as such Senior Circuit Judge, finds that the public interest requires that Martin T. Manton, a Circuit Judge of the Second Judicial Circuit, be designated and assigned as a Circuit Judge of this Judicial Circuit to hold a District Court within such Circuit, it is hereby

ORDERED, ADJUDGED and DECREED, that the said Martin T. Manton be and he hereby is designated and assigned to hold a District Court of the United States for the Southern District of New York, Second Judicial Circuit, during the period beginning August 25, 1932, and particularly to hear and determine all applications and proceedings in the matter entitled *American Brake Shoe and Foundry Company* v. *Interborough Rapid Transit Company*."

At the same time, the Senior Circuit Judge invoked Section 23 of the Judicial Code, which provides:

> *"District with more than one Judge; Division of business.* In districts having more than one district judge, *the judges may agree upon the division of business and assignment of cases for trial in said district;* but *in case they do not so agree*, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district."

and made an order to be hereafter referred to as "Division of Business Order", quoted in margin.*

Petitioner contends that both designations were unauthorized, under any proper interpretation of Sections 18 and 23 of the Judicial Code, since the conditions named or contemplated in those sections did not exist warranting their invocation; so that at the outset, we are confronted

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* "WHEREAS, Section 23 of the Judicial Code provides that 'In Districts having more than one District Judge, the judges may agree upon a division of business and assignment of cases for trial in said District; *but in case they do not so agree, the Senior Circuit Judge of the Circuit in which the District lies shall make all necessary orders for the division of business and the assignment of cases for trial in said District*'; and

WHEREAS, Martin T. Manton, a Circuit Judge of the Second Judicial Circuit of the United States designated and assigned to hold a District Court in the Southern District of New York in said Circuit, and acting as District Judge for the Southern District of New York in this Second Judicial Circuit, does not agree upon the division of business and assignment of cases for trial in the Southern District of New York as provided in and pursuant to the rules of court for the Southern District of New York heretofore adopted by the then United States District Judges for the Southern District of New York; it is hereby

ORDERED, ADJUDGED and DECREED, for a period of thirty days beginning with this day, *all applications for the appointment of receivers in equity causes in the Southern District of New York may be made not only to the District Judge designated to hear such application pursuant to Rule 11-a of the General Rules of the District Court* for the Southern District of New York, but also to Martin T. Manton, Circuit Judge designated to act as District Judge to hold a District Court for the Southern District of New York."

with the inquiry as to the Senior Circuit Judge's power to designate himself a district judge to take charge of the *Brake Shoe* case. It is our position that Judge Manton's action was *coram non judice*, and there was therefore no district court forum lawfully created in which he could act. If we are correct then, as this necessarily goes to the essence of his power to have acted in the cause, it would be unnecessary to consider the validity and force of Rule 11-a and Rule 1-a of the General Rules of the District Court.

## *Section 23 of J. C. (U. S. Code, Tit. 28, Sec. 27).*

Section 23 of the Judicial Code cannot be deemed the source or justification of Judge's power to act, as there was no disagreement among the district judges regarding the division of business of the court (R. 717). It appears to be conceded by counsel for the respondents, because the Senior Circuit Judge misconceived or disagreed with the unanimous thought and action of the eight district court judges as to the wisdom or propriety of Rule 11-a regarding the part of the court to which an application for equity receivers should be made, that he could not by virtue of Section 23 of the Judicial Code designate himself a district judge; then report to himself as Senior Circuit Judge that he had disagreed with the other eight district judges, and upon the basis of such disagreement, direct that the application for the appointment of receivers should be made to him (R. 715). The incongruity of the argument becomes pronounced when it is considered that Section 23 contemplates that the Senior Circuit Judge is required to act as an arbiter or peacemaker to settle any disputes that might arise among the district judges in respect to the division of business.

## *Section 18 of J. C. (U. S. Code, Tit. 28, Sec. 22).*

This leaves Section 18 of the Judicial Code as the only possible source of authority for the designation. In considering the action taken by Judge Manton thereunder, we are again faced with (a) Judge Manton's opinion reported in 1 Fed. Supp. 826-7, specifically mentioning the "public interest affidavit" as the basis for his finding that the public interest prompted him to make the designation order; (b) said affidavit, and opinion, show that the interest therein mentioned was a private interest, and not the kind of interest contemplated by the statute; for the question whether an individual receiver rather than a corporate receiver should be appointed in a particular case obviously affects the private interests of that defendant and its creditors, and is only remotely a matter of public concern; (c) that the court was not precluded from inquiring into the question of public interest in a case where the record is plain that the alleged necessity was an unjustified fear that a corporate receiver might be appointed by the regularly assigned district judge (if the papers had been presented to him), and presumably over the objection of the interested parties, where no court rule existed requiring the appointment of corporate receivers in equity causes; (d) that while Section 18 of the Judicial Code confers the right upon the Senior Circuit Judge to designate and assign a circuit judge *to hold a district court* in proper cases, it gave no right to assign the designated judge to take charge of a particular case in violation of established court rules.*

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* It occurs to us that section 18 of the Judicial Code was intended to cover emergency situations, but not to permit the Senior Circuit Judge to designate himself for the purpose of attaching himself to an immense intricate receivership, involving a large part of each day over a period of several years, to the detriment of his judicial duties. The efficient handling of these receiverships, involving, for instance, the right to abrogate the existing Manhattan lease, the millions of special deposits in excess of sinking fund requirements under the Interborough 5% Bonds,

### *Rules 1-a and 11-a of District Court General Rules.*

If this court should hold, notwithstanding the grounds hereinabove and hereinafter urged, that a fair construction of Section 18 authorized the designation orders, then we are faced with the inquiry whether, violation of General Court Rules 1-a and 11-a (assuming, as did the court below, that the same were valid rules of law; R. 1029) go to the jurisdiction of the judge who disregards them. These rules, adopted unanimously by the eight district judges, provided, that the judges appointed to sit in the southern district of New York should attend to such judicial work as was assigned by the senior district judge (Rule 1-a); and that applications for the appointment of receivers in equity causes should be made to the judge of the court regularly assigned to the motion part (Rule 11-a). Both rules were adopted pursuant to express authority conferred by Section 23 of Judicial Code, and by Section 731, of U. S. Code. There is no law of the United States, and no rule prescribed by the Supreme Court under Section 730 of the Code, which was designed to regulate the practice of the court below on the particular matters set forth in General Rules 1-a and 11-a; nor are said rules inconsistent with any other statute or rule prescribed by this Court. Said rules are ordinarily designated calendar rules, intended as "necessary or convenient for the advancement of justice and the prevention of delays in proceedings" and of course apply exclusively to the federal court in the southern district of New York.

Entirely aside from argument that may be advanced on this appeal by counsel for respondents as to the validity and effect of the District Court Rules in question, we beg

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the preservation of the 5-cent fare on the lines in question under the contracts with the City of New York (*City of New York* v. *Interborough*, 257 N. Y. 20, 36), and many other intricate problems would take up the time of any district judge to the virtual exclusion of any other work.

leave to quote the following excerpts from the record, as showing the position of Mr. William D. Guthrie, and of Mr. Charles H. Tuttle, counsel in chief for said respondents, at the all-day session before District Judge Woolsey.

"The Court: * * * The whole question is whether these rules 1-a and 11-a * * * are a valid exercise of the District Court's rule making jurisdiction. And if they are valid, why wasn't Judge Patterson the only person who might be approached on the subject of equity receivership?

Mr. Guthrie: Why, *if they are valid, of course he ought to have been applied to. If they are valid, Judge Manton should not have presumed to do a thing without permission of Judge Knox.*" (Judge Knox is the Senior District Judge of the Court) (R. 918).

"The Court: Mr. Tuttle * * *. I have just read this case of *Galveston Dry Dock & Construction Company* in 40 Fed. (2d), and that was a case in which Judge Manton, Judge Hand and Judge Chase sat in the Second Circuit Court of Appeals, and Judge Hand wrote the opinion, and he said the rule had the force of law and that the Circuit Court of Appeals were as much bound by it and as much bound to observe it as though it were a statute.

Mr. Tuttle: *There is no question in our minds, Judge, that a rule competently passed under authority of statute has just the effect of a statute*" (R. 885).

The other determining questions raised on this appeal will be treated in argument.

## *Specifications of Error.*

1. The Court below should have held that, as there was no disagreement among the district judges as to division of business, and as an "alleged" disagreement was the sole basis upon which Judge Manton designated himself a district judge for the purpose of assuming jurisdiction in the *Brake Shoe* case, his order appointing receivers was void.

2. The Court below should have held that, upon the facts of record, it affirmatively appeared that there was no public interest which authorized Judge Manton to designate himself a district judge to appoint receivers in the *Brake Shoe* case, and hence his acts as district judge were *coram non judice.*

3. The Court below erred in holding that Judge Manton's orders should be upheld at the least as those of a *de facto judge.*

4. The Court below should have passed upon the validity of Rules 1-a and 11-a of the General Rules of the District Court for the Southern District of New York, and should have declared such rules valid.

5. The Court below erred in holding that Rule 11-a was merely directory, and that the admitted violation thereof by Judge Manton did not constitute a jurisdictional defect rendering the appointment of receivers in the *Brake Shoe* case void.

6. The Court below erred in holding that, on the assumption that Rule 11-a was only directory, the appointment of receivers by Judge Manton in violation of said rule, could not be attacked by an independent bill, to which all of the parties in the *Brake Shoe* case were made parties defendant.

7. The Court below erred in not holding that the *Brake Shoe* case was a friendly and collusive proceeding, brought by a simple contract creditor, without the requisite standing to institute such proceeding and, should, therefore, have affirmed the order of Judge Woolsey setting aside all of the orders of Judge Manton.

8. The Court below erred in not passing upon the sufficiency of petitioner Johnson's original bill, and supplementary bills, and in failing to hold that the same stated a good cause of action cognizable in equity.

## *Summary of Argument.*

A summary of the argument which follows is contained in the index.

# ARGUMENT.

## I.

### The "Division of Business Order" (under Section 23 of Judicial Code) was without actual basis or justification, and was therefore ineffective and void.

As Judge Manton predicated his right to hear the application for receivers in the *Brake Shoe* case (notwithstanding the inhibition of Rule 11-a of the District Court Rules), upon Section 23 of the Judicial Code, we contend that he lacked authority to appoint receivers, unless said section justified his action.

Section 23 naturally divides itself into two parts, namely: (a) in districts having more than one *district* judge, the judges may agree upon a division of business and assignment of cases for trial in said district; and (b) in case they do not so agree, the Senior Circuit Judge shall make all necessary orders for the division of business and the assignment of causes for trial in said district.

After quoting the said section in his order, Judge Manton stated that he,

> "does not agree upon the division of business and assignment of cases for trial in the Southern District of New York heretofore adopted by the then United States District Judges for the Southern District of New York",

and therefore directed that for a period of thirty days from August 25, 1932, "all applications for the appointment of receivers in equity causes in the Southern District of New York may be made *not only to the District Judge designated to hear such applications pursuant to Rule 11-a of the General Rules of the District Court for the Southern District of New York*, but also to Martin T. Manton, Cir-

cuit Judge designated to act as District Judge to hold a District Court for the Southern District of New York".

Here there is clear recognition of the validity of Rule 11-a, except as applied to himself. Judge Manton did not question such rule as beyond the powers of the district judges to promulgate, but he merely referred to a "suppositious disagreement" among the district judges as to division of business under such rule.

(a) *It is undisputed that there was no disagreement among the judges of the district court as to the division of business and no conflict whatsoever among them. Judge Woolsey makes this entirely plain in his opinion* (R. 716-717):

> "As I have set forth above, on June 29, 1932, there was filed with the Clerk an agreement for the division of business for the past summer, signed by the eight Judges of this Court.
>
> By that agreed division, Judge Patterson was to sit in Bankruptcy and General Motions from August 15, 1932, through and including August 29, 1932.
>
> There was also filed with the Clerk, on the same day, an agreement, signed by all the judges of this Court, for the division of business for the Court year just beginning—October, 1932 to June, 1933.
>
> Accordingly, what I have called the domestic economy of this Court was wholly tranquil. There was no disagreement of any kind among the Judges as to the division of business. Therefore, the condition precedent—of disagreement among the District Judges—on which alone the Senior Circuit Judge had a right to step in and make an order of division of the business of the District Court did not exist, and Judge Manton's order of designation of business of August 25, 1932, was entirely void so far as its having any effect on the rules of this Court or the division of business in this Court."

(b) *The section intended that the Senior Circuit Judge should act as peacemaker, and not as one of the disputants.*

Simultaneously with the first order of designation, Judge Manton proceeded to declare that he found himself in disagreement with the judges as to the division of business. It would be interesting to know at what moment this disagreement arose. We submit there is no escape from the conclusion that Judge Manton was acting in a dual capacity at one and the same time; first he created himself a judge of the district court; then he declared (without anyone else knowing it) that he found himself in disagreement with the other judges as to the division of business as a judge of the district court. Query, when did he shed his cloak as a district court judge and don his robes as senior circuit judge? and then in that capacity, assume to divide the business over which he suggests that there was a dispute. The very language of the section contemplates a disinterested senior circuit judge for the purpose of settling disputes between two or more of the regularly constituted judges of the district court. It would be contrary to every principle of Anglo-Saxon jurisprudence if Judge Manton could appear as a disputant with other judges and, at the same time, act as the sole arbiter to settle such dispute. The statute obviously never intended any such result. Judge Woolsey puts the matter plainly when he says at page 716 of the record:

> "It seems to me to be perfectly clear, that normally, as a disagreement *inter sese* as to the division of business between the district judges of a district can only arise in the district court and between them, the request for aid in settling their disagreement should be initiated by them and should come from them to the Senior Circuit Judge as the third party named by Section 23 with statutory power to act in settlement of their dispute.

> If that is the normal method by which Section 23 of the Judicial Code should be invoked, there certainly would have to be a very marked case of disagreement, which amounted at least to a public scandal, to warrant a departure from that method and to justify the unasked intervention of the Senior Circuit Judge."

Section 23 can hardly be interpreted to mean, as it would have to be, in order to sustain the order of Judge Manton, that a Senior Circuit Judge can designate himself a district judge for the sole purpose of acting upon a disagreement which is brought into being between himself, as such district judge, and the appointed district judges, consequent upon such designation. Section 23 was enacted so that the Senior Circuit Judge could act as peacemaker and compose the differences between the appointed district judges, and not that he himself should create such dissension. The second order of Judge Manton thus being void, as being in excess of any authority, we submit that he was without right to appoint receivers in violation of Rule 11-a of the General Rules of the District Court and that his action under Section 23 was totally without jurisdiction. The Circuit Court of Appeals of the Eighth Circuit so construed Section 23 in *Case v. United States*, 14 Fed. (2d) 510. It there appeared that Judge Kennamer had assumed jurisdiction in violation of a division of business order by presiding at the criminal trial of a defendant named Case. After conviction and sentence he brought a writ of habeas corpus to secure his release. The Circuit Court of Appeals (per Woodrough, *J.*), said, in part (p. 513):

> "It is clear that, if exactly the same official powers within a certain territory are conferred upon two men, there is a possibility of conflict. Manifestly, effective means to divide the powers necessarily involves a withdrawal of some powers from

> each. It is equally obvious that the withdrawal of the powers, when lawfully made, must be deemed absolute or the whole object and purpose of the division is defeated and the conflict remains.
>
> The proceedings here disclosed being in contravention of the order and the act of Congress were clearly void, and the petitioner for writ of habeas corpus was deprived of his liberty without authority of law."

In the case at bar the eight district judges of the southern district had, pursuant to the authority of Section 23 of the Judicial Code, divided the business of the Court by providing that applications for the appointment of receivers should be made to the Judge holding the motion part. Since the Senior Circuit Judge assigned the case to himself without the existence of the necessary prerequisite, namely, a disagreement among the district judges, his acts were entirely without jurisdiction.

Another case very much in point on the proposition that a Judge whose power to act in a given case is predicated upon the existence of certain conditions, cannot himself create such conditions for that purpose, is *Hanley* v. *City of Medford*, 56 Oregon 171 (1910).

There Section 1 of the Sessions Laws 1878 authorized Circuit Judges to hold circuit courts in any judicial district of the State where, for any reason, the judge elected for that district could not attend; and Section 2 authorized necessary orders to be made in any suit pending therein by any other circuit judge in the absence of the judge of the Court.

The facts of the case were, that an action had been commenced by the City of Medford in Jackson County to condemn and appropriate a right of way over the land of the plaintiff. The plaintiff demurred to the complaint, where-

upon the City applied to Judge Hanna, who was Judge of the Judicial District in which Jackson County was located, to call a special term to try said cause. Such application was denied on the ground of laches, whereupon the County Judge of said County applied to the Governor of the State to call a Special Term of the Circuit Court of Jackson County on the ground that Judge Hanna, owing to the status of judicial business in that County, was unable to hold, and for that reason had declined to call, a Special Term of Court. Acting upon this application the Governor directed Judge Coke, one of the Circuit Judges of the Second Judicial District, to proceed to Jackson County and call a special term of the circuit court for that county to try said particular cause. Accordingly, Judge Coke proceeded to said county and without the assent of Judge Hanna called said Special Term for a certain day to try said cause. The plaintiff not appearing, judgment was entered in favor of the city, condemning the right of way and awarding the plaintiff $600 therefor.

Thereupon the plaintiff brought suit to restrain the city from entering upon his land and to expunge from the journal of the Circuit Court the record of the proceedings had at the so-called special term of the court, upon the theory that the court pronouncing said judgment was not legally convened and that, therefore, said judgment was void and should be removed from record as a cloud on plaintiff's title.

It was held that the action was maintainable, on the ground that said judgment was void, because there was no authority in the Governor to authorize Judge Coke to call the special term nor in Judge Coke to call the same in pursuance of such authorization.

The Court said at page 178:

> "The power given is to hold circuit courts in any of the judicial districts of the State at the

time appointed by law or by the judge of the district in pursuance of law. This cannot include power to call a special term of the circuit court because the exercise of the power depends upon the inability of the judge of the district to attend. How can it be said that there is any inability of the judge to attend upon a court that does not legally exist? If no term has been appointed by law, and none has been called by him in pursuance of law, there is nothing upon which he is required to attend. *And to say that some other judge may appoint a term at a time when the judge of the district may not attend, and create a duty to attend is to say that he himself may create the condition on which the existence of the power he is attempting to exercise depends; that is, that he may invest himself with authority to call a term.* And for the same reason an order calling a special term of the circuit court in the district of another judge to try a particular cause is not an order in the action or suit to be so tried, as contemplated by Section 2 of the act, being Section 944, B & C Comp."

It follows that Judge Manton having himself created the condition upon which his power to intervene was based, namely, a disagreement between himself and the eight district judges, his second order which was the foundation of his power to act in the *Brake Shoe* case, was void, and, hence, the appointment of receivers by him was, likewise, *coram non judice.*

*Case* v. *United States,* 14 Fed. (2d) 510 *supra.*

## II.

**Senior Circuit Judge Manton had no power under Section 18 of the Judicial Code to designate himself to hold a district court to hear the *Brake Shoe* case, as it affirmatively appeared that no public interest required such designation and the order of designation was, therefore, void.**

Judge Manton's "Designation Order" (R. 177) was made pursuant to the provisions of Section 18 of the Judicial Code, which provides:

> "The Chief Justice of the United States, or the circuit justice of any judicial circuit, or the senior circuit judge thereof, may, if the public interest requires, designate and assign any circuit judge of a judicial circuit to hold a district court within such circuit."

(a) *Since the record affirmatively shows what the alleged public interest was, such alleged public interest is the only one which may be considered.*

Whether or not the recital of Judge Manton in the order designating himself, that the public interest required such designation, would be conclusive that there was such a public interest, in the absence of a statement by the Senior Circuit Judge what such public interest was, is not of importance here, because in this case, we have not only the affidavit of James L. Quackenbush, which was the paper upon which Judge Manton acted in making said order, but also his opinion in *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 1 F. Supp. 820, expressly setting forth the nature of said alleged public interest.

It has been held by this Court that, where the record states the evidence or makes an averment with reference to a jurisdictional fact, it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred.

*Old Wayne Life Ass'n* v. *McDonough*, 204 U. S. 8, 17;
*Galpin* v. *Page*, 18 Wall. 350;
*Johnson* v. *Southern Pacific Co.*, 150 Cal. 535, 537.

It may be true that, where the particular public interest is not mentioned in the order of designation, it might be presumed that there was evidence before the Judge making the order showing the existence of what was the public interest requiring such designation. Here, however, the affidavit of James L. Quackenbush and the opinion of Judge Manton, above referred to, show that the public interest, which it is claimed required Judge Manton to designate himself a District Judge to assume jurisdiction in the *Brake Shoe* case, was the unwarranted fear that Judge Patterson, who was sitting in the motion part of the Court, and to whom under Rule 11-a of the General Rules of the District Court an application for the appointment of receivers should have been made, might possibly have appointed a corporate receiver, rather than individual receivers.

The affidavit of James L. Quackenbush is entitled "Affidavit Showing Necessity of Individual Receivers" (R. 175). In this affidavit Mr. Quackenbush says "that on account of the complexity of the questions which will arise from time to time in the course of the administration of the foregoing cause, he believes and he is informed that the parties hereto believe that it is important and in the public interest that no receiver in the cause should be a trust company

or any other corporation, but that the receiver or receivers should be an individual or individuals who could give constant and individual attention to the matter."

And Judge Manton in his opinion in the above case 1 Fed. Supp., 820 says at page 826, that counsel presented this affidavit of James L. Quackenbush to him on August 25, 1932, and that they protested their grave apprehension *that, if they applied to the District Court*, the Irving Trust Company might be appointed receiver. There was, however, no court rule calling for the appointment of a corporate or bank receiver in equity causes (R. 840). Judge Manton then states at page 827 of said opinion:

> "It therefore appeared to me, after considering the pleadings then before me, that this was essentially a case requiring, in the public interest as well as in the interest of the creditors, the appointment of individual receivers, the selection of which involved careful consideration by the Court of their personal qualifications and ability to manage such a street railway system."

It thus appears that the alleged "public interest" which Judge Manton says required him to designate himself, was a baseless fear that a corporate receiver might be appointed.

Therefore, under the authorities above referred to, it will not be presumed that there were other facts upon which the existence of a public interest requiring his intervention might be predicated.

(b) *The mere recital in the order of designation that the public interest required such designation was not conclusive.*

It will be found that Section 18 prior to the amendment of 1922 (42 Stat. 639), read, that "whenever, *in the judg-*

*ment of the senior circuit judge* of the circuit in which the district lies, * * * the public interest shall require, the said judge * * * shall designate and appoint any circuit judge of the circuit to hold said district court", whereas, by the amendment of 1922, the words *"in the judgment of"* were omitted. These words, however, were not eliminated by the amendment of 1922 from Sections 13, 16 and 17, of the Judicial Code, relating to the appointment of district judges.

Moreover, Section 18, as amended, in the second sentence of said section permits the Chief Justice of the United States *if in his judgment* the public interest requires to designate the judges of the United States Court of Customs Appeals.

We believe it is fair to assume that such change in Section 18, without a corresponding change in Sections 13, 16 and 17, was not meaningless and that the object of eliminating the words "in the judgment of" from the first sentence of Section 18 and retaining such language in the second sentence of said section, was intended to prevent a circuit judge from being designated arbitrarily to serve in the District Court and thus strip that Court of its Judges, unless the "public interest" required such designation as a matter of fact and not merely to satisfy a whim or other motive of the Judge making the designation.

There is, furthermore, authority for the proposition that a mere recital of "public interest" is not conclusive, but that it is proper to inquire into the facts to ascertain whether there was actually a "public interest".

In *State* v. *Kane*, 173 La. 36 (June 1931), a statute was construed which conferred upon the district judge power to fix sessions of the court in a judicial district composed of more than one parish, and which provided that, after fixing the date of such sessions no change in such date could be made within one year thereafter. The statute also

provided that the fixing of such sessions should not affect the authority of the judge to hold a session at any time in any parish in his district "whenever the public interest may require it".

The judge designated by the district judge to hold such session changed the date of the beginning of such session from the third Monday of May to the first Monday of May, although the third Monday of May had been fixed by said district judge within less than a year from such change.

Such change of date was attacked by the defendant. In order to sustain such change, on the ground that the public interest required it, *the judge making the same had to state facts upon which he based his action*, and, as such facts were found sufficient to justify the change, it was held that a verdict in a criminal case rendered at a term of the Court convened on said earlier date was valid.

The Circuit Court of Appeals relied on *People ex rel. Saranac Land & Timber Co.* v. *Extraordinary Special & Trial Term of Supreme Court*, 220 N. Y. 487, in holding that the recital of a public interest was conclusive as to the existence of such public interest.

In that case, however, the statute authorized the Governor of New York State to convene an extraordinary term of the court whenever "in his opinion the public interest so requires".

In the case at bar, Section 18 does not state that the opinion of the Judge making the designation shall determine whether the public interest requires such designation, and, therefore, we contend that that question should be established like any other fact, so that if there is *no evidence whatever* upon which to predicate a finding of public interest, such order lacks legal support.

The case of *Craig* v. *Hecht*, 263 U. S. 255, cited by respondents in their Circuit Court of Appeals brief, to

the effect that a simple finding of the public interest in a designation order is sufficient, is not in point, insofar as the *Brake Shoe* case is concerned. In the *Craig* case the question of the sufficiency of such a finding was not even raised or considered and furthermore the designation was made in 1921 before the 1922 amendment of Section 18, which amendment as heretofore stated deprived the Senior Circuit Judge of the power of subjectively determining what in his opinion the public interest is and making the test objectively, to wit, that there was in fact a public interest.

In *Pennsylvania Steel Company* v. *The New York City Railroad Company,* 221 F. 440, Judge Lacombe, in designating himself to sit in the District Court to hear a particular case where in fact there was a public interest, said that notwithstanding he had designated himself, if an objection had been made promptly as to the propriety of said order designating himself to hear a particular case, he would have presented a statement of the situation to the Chief Justice of the United States or a Circuit Judge. In the *Brake Shoe* case an objection was promptly made to Judge Manton's order of designation.

(c) *The alleged need of individual receivers did not constitute a "public interest", within the meaning of Section 18 of the Judicial Code.*

In order to interpret the meaning of a statute, it is proper to take into consideration the debates in Congress, as an aid to ascertaining the general object of the Statute and the mischief sought to be remedied.

> *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 650, 651.

In December, 1910, Chairman Moon of The Judiciary Committee of the House of Representatives, in explaining

the bill said at pages 88-89 of Vol. 46 of the Congressional Records:

> "Certain provisions contained in the bill make the plan recommended in this revision as fully elastic as the present system and avoid the necessity for the creation of any new judges. It is provided that if in any district the work devolving upon the District Court is too heavy to permit its prompt transaction by the District Court Judge a Circuit Court Judge not fully occupied may be designated to perform the work as a District Judge under exactly the same principles and regulations as District Court Judges now perform the work of Circuit Court jurisdiction."

At page 89, Mr. Madden:

> "If you take the Circuit Judges away from their original work would not that original work have to be done?"

Mr. Moon of Pennsylvania:

> "* * * I explained that in the first place eighty per cent. of all that work is now done by the District Judges, and that we have a provision that whenever in any district the work accumulates, the Supreme Court justice assigned to that circuit, or the Circuit Court Judge Senior in commission may designate a Circuit Judge to sit in the District Court and relieve the District Judge. Therefore, the machinery is so complete that it does not require a single additional judge."

The Court may also consider as a guide to the true interpretation of a statute, in order to dispel ambiguity, if any exists, the report of the committee having charge of such statute.

*Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320;

*Northern Pacific Ry. Co.* v. *Washington,* 222 U. S. 370, 380;

*Woodward* v. *De Graffenried,* 238 U. S. 284;

*Caminetti* v. *U. S.,* 242 U. S. 470, 490;

*Mennen Co.* v. *Federal Trade Commission,* 288 Fed. 774 (C. C. A., 2nd);

*Jordan* v. *U. S.,* 36 Fed. (2d) 43 (C. C. A., 9th).

Mr. Moon, Chairman of the Judicial Reform Committee, in his Joint Committee Report to the House of Representatives in Document 783, Part I of the 61st Congress, Second Session, said regarding designations of Circuit Judges:

> "It is provided that if in any district the work devolving upon the district court *is too heavy to permit its prompt transaction* by the district court judge, a circuit court judge, not fully occupied, may be designated to perform the work as a district judge under exactly the same principles and regulations as district court judges now perform the work of circuit court judges."

In the Joint Committee reports accompanying the original Judicial Code of 1911 (Senate Reports, Vol. 4, on Revision of Laws, Judiciary Title, 61st Congress, 2nd Session and House of Representatives Reports, Document 783, Part I, 61st Congress, Second Session, on Revision of Laws, Judiciary Title), the respective committees similarly said in setting out the purpose of Section 18 and Section 19 of the Judicial Code:

> "Section 18—This section, in a strict sense, is new. Its purpose, as explained in the general report, is to permit circuit judges to try cases in the district courts in order to prevent congestion

of business in those courts, and to afford business for the circuit judges in circuits in which there is not sufficient business in the circuit courts of appeals to occupy the time of the judges.

"Section 19—In this section the words 'circuit or' are inserted in the first line of the section before the word 'judge'; and the words 'during the continuance of such disability, or, in the case of an accumulation of business', are omitted as being redundant; and by reason of the transposition of section 596, Revised Statutes, to precede this section and the insertion of new section 18, the word 'four' in the second line of the section is changed to 'six'. The purpose of changing the order of the sections is to avoid needless repetition of provisions."

It thus appears from the foregoing examination of the origin of Section 18 that the purpose of said section in providing for the designation of a Circuit Judge to sit in the District Court was solely to effect a prompt disposition of the business of the District Court, that is, to prevent a congestion of business in that Court.

In addition to this reason for the provisions of Section 18 there was this further temporary reason, namely, that it might happen that the Senior Circuit Judge had, prior to the abolition of the Circuit Court by the Judicial Code in 1911, partially heard a case, which it was in the public interest that he should conclude, and which, therefore, required him to designate himself as a District Judge for that purpose.

*Pennsylvania Steel Co.* v. *New York City Railway Co.*, 221 Fed. 440 (*supra*).

In this case Judge Lacombe said that congestion of the District Court or an unfinished case partially heard by a

Circuit Judge prior to the abolition of the Circuit Court were the only grounds justifying a Circuit Judge to designate himself as a District Judge.

If this is the correct interpretation of Section 18, then, of course, the order of Senior Circuit Judge Manton designating himself a District Judge to hear a particular case, which was not then in being, was without legal authority and, therefore, void.

(d) *In no event was there any justification for Judge Manton designating himself, until Judge Patterson refused to appoint individual receivers.*

On August 25, 1932 and August 26, 1932, Judge Patterson, who had been duly assigned to the motion part of the Court, was in his chambers ready to receive any application for the appointment of receivers in equity, but no application for such appointment was made to him in the *Brake Shoe* case (R. 705-6).

Before the parties adopted the unusual procedure invoked by them to have Judge Manton assume jurisdiction over the cause, they should have inquired of Judge Patterson whether he intended to appoint a corporate receiver or individual receivers. There was no rule of the District Court requiring the appointment of a corporate receiver in equity causes. It was only in bankruptcy proceedings that by Rule 27 of the Bankruptcy Rules the Irving Trust Company had been appointed standing receiver. The parties had no reason to believe that Judge Patterson would have appointed a corporation as receiver and, hence, were not justified on account of said alleged fear in going over the head of Judge Patterson and having Judge Manton designate himself District Judge for the sole purpose of assuming jurisdiction in the *Brake Shoe* case.

(e) *The general designation order of Judge Manton dated March 20, 1930* (R. 708), *is not applicable to the*

*case at bar for the reasons given by Judge Woolsey in his opinion* (R. 708), *first, because such general blanket orders have been entered by every Senior Circuit Judge to provide against possible unexpected emergencies and, the general order of Judge Manton is not in any way involved, either directly or indirectly in the present situation, secondly, because Judge Manton did not purport to act under this general order.*

(f) *Section 18 did not empower Judge Manton to designate himself to hear a particular case.*

Section 18 of the Judicial Code under which Judge Manton purported to act does not provide for any selective designation or any focussing of judicial activity in the District Court (per Woolsey, *J.*, R. 714). This section merely provides if the public interest requires, then a Circuit Judge of the Judicial Circuit may be designated to hold a *District Court* within such Circuit. Under the broadest interpretation, the language of Section 18 *"to hold a District Court"* cannot be interpreted to mean that a Senior Circuit Judge can choose to hear any particular case for any reason which he may arbitrarily deem sufficient. To so hold will continue the existing chaos in the efficient and smooth administration of justice in said District Court.

The Interborough receivers in the Court below cited as instances where a Circuit Judge was designated to hear a particular case, *United States* v. *Gill*, 292 Fed. 136; *McClintock* v. *United States*, 60 Fed. (2d) 839, and *Pennsylrania Steel Co.* v. *New York City Railway Co.*, 221 Fed. 440. In the *Gill* case, there was an action pending which the regular District Judge was disqualified from hearing, and thereupon the Senior Circuit Judge for the Fourth Circuit, because there was a vacancy and

no other District Judge available, designated another judge to try that particular case. This was equally true of the case of *McClintock* v. *United States*. In the *Pennsylvania Steel Co.* case (*supra*), Judge Lacombe had previously conducted proceedings in that case, and consequently there was a special reason for his continuing to conduct the proceedings in that particular case.

In the *Brake Shoe* case, Judge Patterson, before whom the case would have come in regular course under the District Court Rules, was not disqualified to hear it nor are the reasons given by Judge Lacombe in the *Pennsylvania Steel* case applicable here.

Where designations have been allowed to be made for a particular case, such effective Rules as 1-a and 11-a of the District Court (hereinafter to be discussed) were not in effect.

It is submitted, there was not even a cause of action in existence when Judge Manton made the order designating himself as a District Judge on August 25, 1932 in the *Brake Shoe* case. The court record shows that it was not until August 26, 1932 that the bill of complaint in the *Brake Shoe* case was filed in the Clerk's office (R. 170, 835, 836). Therefore, at the time the "designation order" was made, there was nothing to which it could attach itself.

## III.

### The "public interest" designation and "the division of business" orders being void, Judge Manton did not become a district judge.

It has been shown that the two orders of Judge Manton made on August 25th, 1932 were void. He, therefore, never became a District Judge. A point was made by counsel for the respondent in the court below that, because Judge

Woolsey did not vacate either the order by which Judge Manton designated himself or the order as to the division of business, he could not vacate the orders of Judge Manton appointing receivers. The answer to this argument is that such orders were innocuous, until Judge Manton took some action based upon such orders. In vacating the orders of Judge Manton which were predicated upon his designation as a District Judge to hear the *Brake Shoe* case, the orders of August 25th, 1932 became inert.

Since the orders of August 25th, 1932 were void, it necessarily follows that Judge Manton never became a District Judge and had no power to exercise the functions attaching to such a Judge.

In *Manning* v. *Ketcham*, 58 Fed. (2d) 948 (C. C. A. 6th), the Court said:

> "When a judge acts in the clear absence of all jurisdiction, *i. e.*, of authority to act officially over the subject matter in hand, the proceeding is *coram non judice*. In such a case the judge has lost his official function, has become a mere private person, and is liable as a trespasser for the damages resulting from the unauthorized acts. Such has been the law from the days of the case of *The Marshalsea*, 10 Coke 68. It was recognized as such in *Bradley* v. *Fisher*, 13 Wall. (80 U. S.) 335, 351. In *State ex rel. Egan* v. *Wolever*, 127 Ind. 306, the Court said: 'The converse statement of it is also ancient. Where there is no jurisdiction at all there is no judge, the proceeding is as nothing.'"

Even more in point is *Hanley* v. *City of Medford*, 56 Oregon 171 (1910), *supra*, pp. 19-20.

At page 175 the Court said:

> "A court consists of persons officially assembled under authority of law at the appropriate time and

> place, for the administering of justice, *Marsden* v. *Harlocker*, 48 Or. 90, 97 (85 Pac. 328, 331; 120 Am. St. Rep. 786). To constitute a lawful court, therefore, the persons who assume to hold such court and dispense justice must be officially assembled under authority of law, and the court must be held at the appropriate time and place appointed by law therefor. If the person assuming to act as judge was not then invested with judicial authority (that is, with the power of the law to declare and record its mandate), then his acts in attempting so to do are of no consequence whatever, and are void. And if he were fully invested with judicial authority, so as to make his pronouncement of the law effective, still the time and place of holding the court are equally essential; for, when the law prescribes the time and place for the holding of court, then time and place are as essential limitations of jurisdiction, as are subject matter and parties. *Ex parte Branch & Co.*, 63 Ala. 383; *McCool* v. *State*, 7 Ind. 378; *Brumley* v. *State*, 20 Ark. 77; *Norwood* v. *Kenfield*, 34 Cal. 329, 332; *Ex parte DeHay*, 3 S. C. 567."

In the case at bar, as in the above case, there was a judge, namely, Judge Patterson, who had been invested with authority and was ready to hear applications for the appointment of receivers in equity, to whom no application, however, was made to appoint receivers in the *Brake Shoe* case, and yet another judge, namely, Senior Circuit Judge Manton, assumed jurisdiction over said *Brake Shoe* cause, for fear lest Judge Patterson might not appoint individual receivers, although there was no evidence that Judge Patterson, if he had been asked to act, would have appointed a corporate receiver.

Upon such facts, it is respectfully urged, Judge Manton did not have power to supplant the duly assigned Justice, who, on the day in question, alone had authority to hear applications for the appointment of equity receivers.

## IV.

**The order appointing receivers cannot be sustained as that of a *de facto* judge.**

If we are correct in our contention that Judge Manton never became a District Judge, his order appointing receivers cannot be sustained as that of a *de facto* judge.

It has been held that there cannot be a *de facto* judge acting or purporting to act in the part of the court in which a *de jure* judge is present and functioning.

*U. S.* v. *Alexander*, 46 Fed. 728, 729;
*Hamlin* v. *Kassafer*, 15 Or. 456, 459;
*Boardman & Perry* v. *Halliday*, 10 Paige (N. Y.) 223, 232;
*Cohn* v. *Beal*, 61 Miss. 398, 399;
*State* v. *Blossom*, 19 Nev. 312;
*Cox* v. *Railway Co.*, 68 Tex. 226;
*Ridout* v. *State*, 161 Tenn. 248 (1929);
Mechem on Public Officers, Secs. 322 & 323, p. 216.

In *Ridout* v. *State*, *supra*, there is an exhaustive review of the authorities, pointing out the difference between a *de facto* officer and a usurper. The Court at 270 of the opinion states that there are six exceptions to the application of the *de facto* rule. One of such exceptions is where, as pointed out in the other authorities above referred to, "a judge *de jure* was in actual present possession and occupancy of the office, in fact, functioning in discharge of its duties".

The other exception to the rule is "where the act, or exercise of the office was single, continuity being lacking".

In the case at bar, the facts are within both of these exceptions. There was a Judge *de jure* in actual present

possession and occupancy of the Motion Part of the Court, where applications for the appointment of receivers were required to be made, who was "functioning in discharge of its duties", to wit, Judge Patterson; secondly, the act of Judge Manton in making the order appointing receivers "was single, continuity being lacking" and such order was promptly attacked.

In *State* v. *Blossom*, 19 Nev. 312, the Court at page 315 uses this language:

> "Two physical bodies cannot occupy the same space at the same time, and two persons cannot be officers *de facto* for the same office at the same time."

There is, therefore, no escape from the conclusion that the order of Judge Manton appointing receivers cannot be validated as the act of a *de facto* Judge.

## V.

### The entire *Brake Shoe* proceeding was a collusive one the orders in which were properly set aside by Judge Woolsey.

There can be no reasonable doubt that the *Brake Shoe* case was collusive. The complaint was filed at the instigation of the Interborough in order to accomplish certain questionable purposes, chief among which was and is, to wipe out the entire equity of the stockholders and second mortgage bondholders of the Manhattan Railway Company (R. 35-6; 57-8; see note, p. 3, *infra*). The Receivers of Interborough have made it perfectly plain that such destruction is a present possibility. The Interborough Rapid Transit Company would thereby take unto itself a large system of elevated railroads conservatively estimated to be worth between $150,000,000 and $200,000,000 which has not a

single creditor other than the holders of its $41,000,000 of 4% bonds, which have fifty-seven years to run, without sinking fund or other onerous conditions. A few facts of record will suffice to show that these receiverships were prearranged.

In addition to the fact that the consent decree appointing the Interborough receivers was made at the instance of a single contract creditor (R. 164), it will be noted that Messrs. Chadbourne, Stanchfield & Levy, who were appointed solicitors for the Interborough receivers, had represented that company and its affiliated Brooklyn Manhattan Transit Company (called the B. M. T.) within less than a year prior to the receivership (R. 120); that Honorable Victor J. Dowling, one of the appointed Interborough receivers, was a member of the law firm of the said firm of solicitors, before he resigned to take up his receivership duties (R. 24, 72, 73).* Mr. Chadbourne, the senior member of said law firm, had for years been closely connected with the Brooklyn Manhattan Transit Company which owned a controlling interest in the Interborough stock at the time the receivership was created; the chairman of the board of the Interborough occupied the same position on the B. M. T. Board which was never favorably disposed toward Interborough or its step-child, Manhattan Railway Company, while all three companies had common directors (R. 24, 31, 59-62, 74). On October 10, 1932, four days after the hearing before Judge Woolsey, Messrs. Chadbourne, Stanchfield and Levy resigned as so-

* The New York Times of September 8, 1932, at page 2, gives the following report of an interview with Receiver Dowling: "Victor J. Dowling, former Presiding Justice of the Appellate Division, who was named as one of the Interborough receivers, arrived from Europe yesterday aboard the 'Europa'. He said his appointment had come as 'a complete surprise'. *He indicated it might necessitate his resignation from the law firm of Chadbourne, Stanchfield & Levy, which was named by Circuit Court Judge Martin T. Manton, as counsel for the receivers.* Mr. Dowling said he understood Thomas L. Chadbourne, head of the firm, once had owned Interborough and B. M. T. stock, but he did not know if he still had an interest in either company."

licitors for the Interborough receivers, following criticism leveled against them by the public (R. 549, 229). The bill of American Brake Shoe & Foundry Company was not only not reduced to judgment, but its modest claim on account of supplies furnished to Interborough was payable out of operating expenses, since there was a joint fund specially maintained by the City and the Interborough for the very purpose of paying claims of this nature under the existing contracts with the City of New York (R. 534). (See *Gilchrist* v. *Interborough R. T. Co.*, 279 U. S. 159, at pp. 196, 198). The Quackenbush affidavit and the Receiver's petition for the appointment of their counsel were both notarized by an attorney in the employ of Interborough. All of the executive officers of Interborough were retained in office at fabulous salaries following the receivership, and have since remained in office. The president and counsel of Manhattan was named as Receiver of the latter, and the bill and supplemental bills of petitioner Johnson specifically charge that the receivership of both companies were brought about pursuant to an understanding or conspiracy (R. 25-6, 37, 40-1, 44-5, 57, 70-72). The conclusion is irresistible that it was the purpose of the parties that the receivership should be in friendly hands. The Court below rested its conclusions that there was a controversy upon the ground that the plaintiff had presented its claim for payment and that it was refused. The fact is that Interborough had $5,317,468.51 cash on hand when the alleged refusal took place, while this simple contract creditors' claim for brake shoes and castings furnished was for $27,500 (R. 534). In our opinion, the record abundantly shows that the receivership was brought about to insure "friendly receivers" and "friendly solicitors" and a "friendly foreclosure and sale of the Manhattan Railway Company's properties". It cannot be denied that the alleged controversy was merely a sham and a pretense for the purpose of making it appear that there was a real con-

troversy where none actually existed. That is why Judge Woolsey was led to declare in his opinion, after pointing out that the orders of Judge Manton were entirely void (*Manning* v. *Ketcham*, 58 Fed. (2nd) 948-949):

> "In order to prevent chaotic conditions and the perpetuation by the intruder of his irregular procedure, a judge *de jure* may always vacate and declare void the orders of a usurping or intruding judge * * * His doing so is ultimately for the benefit of the litigants involved in the cause wherein the orders are vacated, and may, if his act is timely, prevent irreparable injury to one or all of them. THIS IS ESPECIALLY TRUE OF THE SITUATION HERE INVOLVED, FOR A CONSENT RECEIVERSHIP IN EQUITY, NOT BEING THE RESULT OF A CONTROVERSY, BUT OF AN AGREED SITUATION, SHOULD HAVE A JURISDICTIONAL FOUNDATION BEYOND SUSPICION BEFORE A COURT TAKES OVER THE OPERATION OF THE ESTATE."

In *Harkin* v. *Brundage*, 276 U. S. 36, 52, this Court said:

> "We do not wish what we have said to be taken as a general approval of the appointment of a receiver under the prayer of a bill brought by a simple contract creditor simply because it is consented to at the time by a defendant corporation. The true rule in equity is that under usual circumstances a creditor's bill may not be brought except by a judgment creditor after a return of '*nulla bona*' on execution.
>
> "* * * More than this, circumstances which should have no influence lead the parties in interest to prefer one court to another in the selection of the person to be appointed as receiver, with the hope on behalf of those in charge of the embarrassed corporation that the appointment may fall to one whose conduct will be in sympathy with, rather than antagonistic to, the previous management of the corporation, in the hands of which the embarrassment

> has arisen. As the Court of Appeals says, there should be no 'friendly' receiverships, because the receiver is an officer of the court and should be as free from 'friendliness' to a party as should the court itself." (276 U. S. 55.)

In *Shapiro* v. *Wilgus*, 77 U. S. Sup. Ct. (L. Ed.) 149, this Court said, in part:

> "True indeed it is that receivers have at times been appointed even by federal courts at the suit of simple contract creditors if the defendant was willing to waive the irregularity and to consent to the decree. This is done not infrequently where the defendant is a public service corporation and the unbroken performance of its services is in furtherance of the public good. *Re Metropolitan R. Receivership*, 208 U. S. 109, 111. * * * We have given warning more than once, however, that the remedy in such circumstances is not to be granted loosely, but is to be watched with jealous eyes. *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334, 345; *Harkin* v. *Brundage*, 276 U. S. 36, *supra*. *Never is such a remedy available when it is a mere weapon of coercion, a means for the frustration of the public policy of the State or the locality.*"

The italicized declaration of this Court last above quoted exactly fits the situation here involved. One of the chief objectives of the receivership was and is to have the Interborough receivers disaffirm or abrogate the existing perpetual lease of Manhattan Railway Company's lines of railroad to Interborough. The Interborough has obtained immensely valuable rights under its contracts with the City of New York as to operation of its subway system which have been held to be inextricably interwoven with the City contracts respecting the elevated lines of railroad, the latter being predicated and firmly founded upon the said

Manhattan lease (*City of New York* v. *Interborough*, 257 N. Y. 20, at p. 36). Said decision shows that the abrogation of the existing lease of Manhattan to Interborough would frustrate the local public policy of the City of New York and destroy the five cent fare upon which all of the valuable gifts and concessions by the City to Interborough were based. No one can nor has seriously questioned that the Interborough-Manhattan receiverships were and are collusive.

## VI.

### Rules 1-a and 11-a of the General Rules of the District Court were valid, and therefore the orders which violated them were void.

Section 731 of the United States Code declares that, "*The district courts may*, from time to time, and *in any manner* not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under section 730 of this title,

> *make rules * * * and otherwise regulate their own practice as may be necessary or convenient* for the advancement of justice and the prevention of delays in proceedings."

Section 23 of the Judicial Code, declares: "In districts having more than one judge,

> *the judges may agree upon the division of business and assignment of cases for trial in said district;*"

By virtue of the statutory authority above granted, the judges of the District Court by unanimous concurrence, adopted as General Rules of the Court, Rule 1-a and Rule 11-a, declaring that,

> "any judge designated to sit in the district court

> for the southern district of New York shall do such work only as may be assigned to him by the senior district judge";

also that,

> *"all applications for the appointment of receivers in equity causes * * * shall be made to the judge assigned to hold the * * * motion part of the business of the court and to no other judge."*

All of the eight District Judges subscribed to this rule. An appropriate order was also entered in the Clerk's office making its effective date July 1, 1932 (R. 702). The rule was also duly published in the New York Law Journal. Said rule adopted, under aforesaid statutory authority, merely states, in writing, the practice theretofore recognized and followed in this District for many years.

We contend that, both under the specific authority of Section 23 of the Judicial Code and under the rule making power conferred upon the District Court by Section 731 of the United States Code, the duly appointed eight District Judges for the Southern District of New York had power to adopt Rules 1-a and 11-a, and that such rules were binding on any judge thereafter properly assigned or designated to sit as a district judge, by virtue of any other section of the Judicial Code.

It has frequently been held that valid rules of the Federal Court have the force of statute.

> *Weil* v. *Neary*, 278 U. S. 160;
> *Galveston Dry Dock & Construction Co.* v. *Standard Dredging Co.*, 40 Fed. (2d) 442;
> *In re Rogers Pyatt Shellac Co.*, 43 Fed. (2d) 863, affirmed 51 Fed. (2d) 988 (C. C. A., 2nd Circuit);
> *In re Robertson*, 4 Fed. (2d) 248;
> *Rio Grande Irrigation Co.* v. *Gildersleeve*, 174 U. S. 603, 608.

Rules 1-a and 11-a were valid rules, and called for obedience, even as does a statute, from litigants, as well as from Judges.

*Clawans* v. *Whiteford*, 55 Fed. 2nd 1037 (C. C. A. D. C.);
*Halter* v. *Wade*, 273 Pac. 1042;
*Lery* v. *Michon Bros.*, 142 La. 825.

This is especially so where the rules are adopted pursuant to statutory authority.

*Matter of Moore*, 108 N. Y. 280, followed in 140 N. Y. 658;
*People ex rel. Jordan* v. *Martin*, 152 N. Y. 311;
*Ex Parte Mayor of London*, 25 Ch. D. 384.

The Supreme Court has held that, a departure from established rules or modes of procedure, will render judgments void, notwithstanding that the Court may have jurisdiction over the parties, and the subject-matter of the action.

*Windsor* v. *McVeigh*, 93 U. S. 274, 282;
*United States* v. *Walker*, 109 U. S. 258, 266-267;
*Boyer* v. *Boyer*, 129 App. Div. 647;
*Henry* v. *Carson*, 96 Ind. 412, at page 423.

The facts, and the procedure followed, bring this case directly within the language of *Manning* v. *Ketcham*, 58 Fed. (2d) 948 (C. C. A., 6th Circuit):

> "When a judge acts in the clear absence of all jurisdiction, *i. e.*, of authority to act officially over the subject-matter in hand, the proceeding is *coram non judice*."

Judge Manton was not a *de facto* Judge. We regret to say, he was an intruding Judge, for the reason as stated

by Judge Woolsey in his opinion (fols. 2154-2157), namely, that

> "there cannot be a *de facto* Judge acting or purporting to act in the Court or in the part of the Court in which a *de jure* Judge is present and functioning."

In *Shepard* v. *Adams*, 168 U. S. 618, it was held that a rule of the district court, even though inconsistent with a federal statute (Conformity Act), was valid, the Supreme Court saying, at page 627:

> "We have a right to presume that *the discretion of the District Court was legitimately exercised in both adopting and maintaining the rule in question.*"

This case was followed in

*Boston & Maine R. R. Co.* v. *Gokey*, 210 U. S. 155, 164;

*Van Doren* v. *P. R. R. Co.*, 93 Fed. 260, 269 (C. C. A., 3rd Circuit);

*Evans* v. *Yost*, 255 Fed. 726 (C. C. A., 8th Circuit).

We submit that the Rules 1-a and 11-a are not inconsistent with any rule prescribed by the Supreme Court under said Section 730 which grants to the Supreme Court power to prescribe rules in respect to forms of writ, processes, modes of framing and filing proceedings and pleadings; taking and obtaining evidence, obtaining discovery, of proceeding to obtain relief, drawing up, entering and erolling decrees, and generally to regulate the whole practice to be used in suits in equity or admiralty by the district court. Equity Rule 79 provides that,

> "With the concurrence of a majority of the Circuit Judges * * *, the District Courts may make any other and further rules and regulations for the prac-

> tice, proceedings and process, mesne and final, in their respective districts not inconsistent with the rules hereby prescribed and from time to time to alter and amend the same."

Rules 1-a and 11-a do not conflict with this rule; they merely regulate the division of business arising in the district court. Clearly, the rules in question have nothing to do with procedure or practice in equity.

Judge Woolsey in his opinion (R. 714) explains that,

> "Rule 11-a merely tells where attorneys have to go to get a receiver appointed, and it does not deal with any practice of any kind in equity. It simply points to the door of the room where applications for receiverships must be made. I do not agree that General Rule 11-a is an equity rule" (R. 714).

The Rules of Equity Practice do not concern themselves with calendar rules governing particular districts. If the Supreme Court had considered that such question was a matter of equity practice to be regulated by it, it is only fair to assume that rules would have been promulgated on the subject. *None of the Federal Equity Rules, not even Rule 79, relate to matters of calendar practice.*

Rules such as Rules 1-a and 11-a, are, therefore, not rules regulating practice within the meaning of the Equity Rules, for the reason above advanced, and the reasons given by Judge Woolsey and, therefore, do not require such concurrence.

An interesting case in point as to the power of a body of Judges to distribute the work of the Court was considered in the case of *Ford* v. *Clarke*, 204 App. Div. 5, affirmed 236 N. Y. 606. In that case Section 2 of Article 6 of the Constitution of New York State provided:

> "The justices of the Appellate Division in each department shall have power to fix the times and

places for holding Special Terms therein, and to assign the justices in the departments to hold such terms; or to make rules therefor."

Section 84 of the Judiciary Law of the State of New York gave to the Justices of the Appellate Division the power to fix the times and places for holding trial as well as special terms.

The plaintiff, a Justice of the Supreme Court, asked for judgment against the Justices of the Appellate Division, First Department, compelling them to make assignments of Justices of the Supreme Court in such manner as to afford him opportunity to perform all the functions of his office by doing his fair share of all the work of the Supreme Court. The plaintiff, in support of his prayer for the above judgment, set forth in his complaint that the Judges of the Appellate Division had assigned him to the tort and contract cases during a much longer period in the aggregate than a fair division of the work of the Court required, and had not assigned him to Special Term work to the same extent as the other Judges of the Supreme Court had been assigned. The Court dismissed the complaint, saying at page 7:

> "The power to distribute the work of the court among the twenty-eight trial justices of the First Department must of necessity rest somewhere. *The object of its exercise is to secure the highest degree of efficiency in the administration of justice and so promote the interest of the public.* Upon the justices of the Appellate Division the power of allotment of the work has been conferred by the Constitution, and it is their duty to exercise it according to their best judgment. They must determine the assignment of the trial justices to contested motions, to ex parte applications, to criminal trials, to

equity, or to trials at law before court and jury, so as best to subserve the interest of the public in the dispatch and accuracy of legal judgments. *Discretion in the exercise of this power is necessarily implied, and no other court or tribunal can substitute its judgment and discretion for theirs.*"

"*The gift of this power* (to make rules) *imposes the duty to exercise it.*"

"A justice suffers no injury and is deprived of no legal right by the act of the justices of the Appellate Division in assigning him principally to Trial Term work" (Headnote).

"His desires must yield to the concerted judgment of the seven justices comprising the Appellate Division."

We believe this language aptly applies to the situation in the case at bar. Section 23 of the Judicial Code provides, that in districts having more than one district judge, the judges may agree upon a division of business and assignment of cases for trial in said district, and it is only in cases where they do not so agree, that the Senior Circuit Court may make orders for the division of such business and assignment of such cases for trial. *Here all of the district Judges agreed as to the division of business and, under the reasoning of the above decision, and particularly the language of Section 23 itself, no other Judge had the right to substitute his judgment and discretion for theirs.*

Not only does Section 23 of the Judicial Code specifically grant to the judges appointed for the Southern District of New York the sole authority to agree upon the division of business, but said section conversely operates also as an inhibition against the Senior Circuit Judge from making any orders for the division of business, where the regularly appointed Judges for such district duly agree upon such division of business.

If Judge Manton desired to question or attack the validity of Rules 1-a and 11-a, he should have adopted the course pursued by Judge Ford in the above case, as suggested by Judge Woolsey in his opinion where he says:

> "It should also be observed here that the validity of rules of a District Court cannot be determined by the administrative orders of a Senior Circuit Judge. Their validity can only be tested judicially in a proper case, and unless so tested, and invalidated, they are binding on all who do business in the Court which made them."

We might well stop here, and go no further with our argument to show that Rules 1-a and 11-a could not be ignored by Judge Manton, for the reason that having invoked Section 23 as the basis of his designation he was under the necessity of establishing that there was, in fact, a disagreement among the Judges below before he could either disregard or interfere with the operation of said rules.

In the court below respondents endeavored to show that the above rules were inconsistent with Sections 9, 13, 14, 15, 16, 17, 18 and 19 of the Judicial Code (being Sections 13, 17, 18, 19, 20, 21, 22 and 23 of Title 28 of the United States Code). This may seem impressive, but it will be found that the said sections all deal with the designation by the Chief Justice of the United States, by the Senior Circuit Justice, or by another Circuit Justice, of other District Judges to sit in the place of those disqualified or unable to sit in such district for various reasons.

Said sections relate specifically to the particular situations mentioned therein and authorize such designations only by reason of the existence of the special state of facts recited therein. It was argued that the judges of the district court cannot pass a rule to prevent the substitute

or additional Judges from sitting in any part of the district court that they might themselves choose, regardless of existing practice and rules; in other words, that such visiting or substitute judges may be a law unto themselves, because it is stated in said sections that such substitute or additional Judges shall have all the powers and rights and perform all the duties of a judge of the district court.

We submit that all of these sections relating to the designation of substitute or additional District Judges by the Chief Justice of the United States or by the Senior Circuit Justice or other Circuit Judge, must be read together, and harmonized to the fulfillment of the purposes for which they were enacted.

It is a well-settled canon of construction that a statute general in its terms will be deemed restricted in its application by another statute relating to the same subject-matter but narrower in scope.

When, therefore, certain sections of the Judicial Code provide for the designation of substitute or additional district judges, giving such judges the same powers as the duly appointed judges for the same district, such powers must be exercised in subordination to Court rules, such as Rule 1-a and Rule 11-a, which were adopted in pursuance of a specific statute, to wit, Section 23 of the Judicial Code, expressly granting such appointed Judges for the district the power to agree among themselves as to the division of business, and under express statutory authority "to make rules * * * and otherwise regulate their own practice" (Sec. 731).

Moreover, as far as Rule 11-a is concerned, as was said in *Ford* v. *Clarke*, 204 App. Div. 4, affirmed 236 N. Y. 606, *supra*, the power to distribute the work of the Court among the District Judges must, of necessity, rest somewhere. What the respondents contended for in the Court

below was that a designated Judge should not be on the same plane with the regularly acting Judges for the District, but that he shall be superior to them, not bound by their rules as to the division of business, but a sort of free lance, at liberty to set at naught the rules of the court on that subject lawfully adopted prior to his designation. Such a theory would introduce chaos in the district court, particularly when several additional Judges are designated to sit there, each of whom could, under such a contention claim to be a law unto himself, differing each from the other as to what part of the Court he desired to sit in, and what kind of work he desired to perform, notwithstanding the existence of a uniform rule theretofore unanimously adopted on the subject by the eight appointed Judges.

After an all-day argument before Judge Woolsey, we pointed out that no substantial reason had been advanced for declaring that the rules in question were invalid, and the court and counsel agreed (R. 970); while as we have already observed in our statement, *infra*, page 12, the counsel in chief for the respondents frankly admitted that if the rules were validly adopted, they were binding alike upon the judges as well as litigants (R. 885, R. 918).

## VII.

**Rules 1-a and 11-a were not merely directory rules and hence a violation thereof rendered the appointment of receivers *coram non judice*.**

Assuming that Judge Manton's designation of himself as District Judge was valid, and that Rules 1-a and 11-a were valid rules, the question is presented whether the admitted violation of said Rules by Judge Manton rendered void his order appointing receivers.

Rules 1-a and 11-a were passed in pursuance of Section 23 of the Judicial Code, above cited, which permits district judges, in districts having more than one judge, to agree upon the division of the business of the Court. They did so agree by virtue of said rules.

We contend the said rules having thus been passed in pursuance of a specific statute itself, had the force of a statute, and their violation rendered the order appointing receivers void.

> *Case* v. *United States*, 14 Fed. (2d) 510 (*supra*);
> *Matter of Moore*, 108 N. Y. 280;
> *People ex rel. Jordan* v. *Martin*, 152 N. Y. 311.

In the *Matter of Moore, supra,* a rule of the Court of Appeals with reference to an applicant for admission to practice as an attorney required proof that the applicant had before, or within three months after the commencement of his clerkship, passed the prescribed Regents' examination. This rule was made under special statutory authority. The applicant failed to file the Regents' certificate showing that he had passed such examination within three months after the commencement of his clerkship. The Court held

that such certificate could not be filed *nunc pro tunc*, saying:

> "The rules of courts are made under special statutory authority, and when made, have the force and effect of statutes (*People ex rel. Mayor, etc.* v. *Nichols*, 18 Hun 535). While a rule, which is merely directory in its provisions, may be disregarded or obviated by allowing the act required to be performed to be done *nunc pro tunc*, this is not so with reference to mandatory provisions * * *. When the rule was adopted it became the law for the court as well as for the citizens upon whom it was designed to operate, and we have no more power to disregard its provisions in determining the rights of a student, than we should have to disregard the force of a statute in determining the rights of individuals thereunder."

The language of Rules 1-a and 11-a is mandatory. We submit that said rules based on special statutory authority rendered void the order involving their violation.

Even if said rules be deemed not to have been made, in pursuance of Section 23 of the Judicial Code, but under the general rule-making power vested in the District Court by Section 731 of Title 28 of the United States Code, the same conclusion must be reached.

As already observed, it has been held that valid rules of the Federal Court, although made only under general statutory authority and not specific statutory authority, have the force of statute.

See cases, *supra*, p. 43.

The Court below held that the rules under consideration being merely for the distribution of business, they must be deemed directory and not mandatory rules. For that reason, the Court reached the conclusion that the order of

Judge Manton, which violated Rule 1-a and Rule 11-a, could be invalidated only by direct attack, and held that the *Johnson* case was a collateral attack. The Court below cited *Scranton Button Co.* v. *Neonlite Corp.*, 105 N. J. Eq. 708, wherein Chancellor Walker vacated a decree made on the advice of a vice chancellor who had disregarded a rule for the distribution of business, and endeavored to distinguish said authority from the case at bar by explaining that the decree which was vacated was in the same suit and the property had already come into the custody of the Court of Chancery in another suit. The Court below, however, did not dispute the proposition laid down in *Scranton Button Co.* v. *Neonlite Corp.*, *supra*, that a decree violating a rule for the distribution of business should be set aside. We shall now endeavor to show that the attack on the order of Judge Manton was a direct attack, and not a collateral attack, and, that, even if we assumed the order was irregular and not void, it should nevertheless have been vacated.

## VIII.

### The *Johnson* suit was a direct attack and not a collateral attack on the order appointing receivers.

The Court below held that the *Johnson* suit was a collateral attack. We do not agree, but even so, if the order of Judge Manton was void, it could be attacked collaterally.

*Thompson* v. *Whitman*, 18 Wall. 457;

*National Exchange Bank* v. *Wiley*, 195 U. S. 257, and cases cited;

*Johnson* v. *North Star Lumber Co.*, 206 Fed. 624 (C. C. of A., 9th Cir.);

*Phebus* v. *Search*, 264 Fed. 407 (C. C. of A., 8th Cir.);

*Nardi* v. *Poinsatte*, 46 Fed. (2d) 347.

Nor will it be disputed that parties cannot confer jurisdiction, where none exists.

*Exporters & Manufacturers Products Inc.* v. *Butterworth Judson Co.*, 258 U. S. 365;
*Barnett* v. *Mayes*, 43 Fed. (2d) 521 (C. C. A., 10th);
*Gatch Tennant & Co.* v. *Mobile & O. R. Co.*, 59 Fed. (2d) 217, and cases cited.

Quite to the contrary, the Court itself must inquire into its jurisdiction, at every stage of the proceedings, and, if it has none, must give appropriate relief.

*Matson Nav. Co.* v. *U. S.*, 52 Supreme Court Reporter 162 (284 U. S. 352).

We contend, however, that the attack upon the decree in the *Brake Shoe* case was a direct attack, and not a collateral attack.

There is a valuable note in L. R. A. 1918 D, page 470, entitled "What is a collateral, and what a direct, attack upon a judgment, within the rule that a judgment that is not void cannot be attacked collaterally". At page 470, it is stated:

> "An action or proceeding, even if an independent one, brought for the purpose of impeaching or overturning a judgment, is a direct attack as distinguished from a collateral attack upon the judgment."

In *Seay* v. *Hawkins*, 17 Fed. (2d) 710 (C. C. A., 8th), a suit was brought to enjoin a tax collector from levying on and selling plaintiff's property for delinquent taxes. The Court held that the suit was a direct attack, for the reason that the relief asked included the prayer that the judgment for taxes be set aside. The Court cited *Powell*

*& Garard Co.* v. *Erath Co., Tex.*, 274 Fed. 305, cert. denied 257 U. S. 645; *Gray County, Tex.* v. *Hamer*, 277 Fed. 155, cert. denied 258 U. S. 624.

In *Warren* v. *Union Bank of Rochester*, 157 N. Y. 259, it was held that the fact that an action seeks to have the mortgage upon an infant's real estate, as well as the whole proceeding in which its execution was directed, set aside, does not render the action a collateral, instead of a direct, attack upon the proceeding. The Court cites *Bank of U. S.* v. *Ritchie*, 8 Peters 128, in which the opinion was written by Chief Justice Marshall. In that case a bill of review, which was a separate proceeding, was brought to set aside a decree in another suit because of various errors therein and it was held that because of such errors the decree should be reversed and the conveyance of the real estate made under the original decree set aside.

See also:

*James* v. *Young*, 111 Kan. 310 (1922).

The rule as stated in 1 Freeman on Judgments (5th Ed.), pages 606-607, is as follows:

> "The object, of course, for which the suit or action is brought is a determining factor. If instituted for the very purpose of setting aside, correcting or modifying the judgment, it is usually regarded as a direct attack, for the attack upon the judgment in such cases is not incidental to the object of the proceeding, and the end of the proceeding is not something collateral to the judgment."

It follows, therefore, under the above authorities, that the *Johnson* suit, in which the prayer for relief was that the decree in the *Brake Shoe* case be vacated and set aside, was a direct and not a collateral attack upon such decree.

## IX.

**Petitioner's attack upon order appointing receivers by filing an independent bill was proper.**

The Circuit Court of Appeals held that notwithstanding Judge Manton violated the effective rules of the District Court, by the order appointing receivers, such order was not void and, therefore, could not be attacked by independent bill.

This whole argument rests upon the assumption that the *Johnson* suit was a collateral and not a direct attack on the decree in the *Brake Shoe* case. We have shown in a preceding point that the court below erred in holding that the *Johnson* suit was a collateral attack on such decree. If correct in this view, then the basis for the conclusion that an independent action did not lie, is destroyed.

However, even assuming that the *Johnson* suit was a collateral attack, we contend that petitioner had the right to attack the decree in the *Brake Shoe* case by such independent action, to which all of the parties in the *Brake Shoe* case were made parties defendant. The Circuit Court of Appeals held that, if petitioner had any other way of setting aside the decree in the *Brake Shoe* case, recourse could not be had to an independent action. We dispute the soundness of this conclusion and maintain first, that petitioner who was a stranger to the bill in the *Brake Shoe* case, had no right to appear specially therein, for the purpose of impeaching the decree therein made; and secondly, even though such procedure might have been open to him, he was not limited to this mode of attack, but was also privileged to proceed by independent action to accomplish the desired purpose.

(a) *The petitioner had no right to appear in the Brake Shoe case to attack the jurisdiction of the Court.*

We contend that Equity Rule 37 precluded an attack upon Judge Manton's orders by intervention and appeal, in the *Brake Shoe* case, for the reason that intervention must be subordinate to and in recognition of the propriety of the main proceeding.

> Rule 37, Rules of Equity Practice;
> *U. S.* v. *California Canneries*, 279 U. S. 553, and cases cited;
> *Central Republic Bank & Trust Co.* v. *Caldwell*, 58 Fed. (2d) 721 (C. C. A., 8th).

The Circuit Court of Appeals states in its opinion on this point (R. 1033):

> "It is true that any intervention must be 'in subordination to, and in recognition of, the propriety of the main proceeding.'"

The Court then suggests:

> "They too wished a receivership, and indeed had no objection to 'the propriety of the main proceeding', except for the judge who was to conduct it, and the receivers appoint."

The lower court failed to observe that the foundation of petitioner's objection to the *Brake Shoe* case was that it was wholly void, because Judge Manton had no power to assume jurisdiction therein. The attack was thus made on the proceeding itself, not on the particular judge, except insofar as he was the one who, by assuming jurisdiction, had rendered a void decree. Obviously, as the proceeding itself lacked a proper legal basis, the petitioner could not supply the jurisdictional defect therein, but it was necessary to remove the illegal foundation and proceed anew for the appointment of other receivers.

It is stated by the court below that the petitioner could

have appeared on the return day of the order to show cause why the receivership should not be made permanent and have asked the removal of the cause to another judge. There are several answers to this argument. In the first place, the petitioner being a stranger to the *Brake Shoe* case had no right to be heard on the return day except by intervention granted by the court upon leave being asked to intervene; and, as we have pointed out, intervention would not have been allowed, where the purpose thereof was not merely to remove the proceeding to another judge, but to upset such proceeding as entirely illegal. There is no practice known to the federal court or any other court, which permits a stranger to a proceeding, to appear specially therein, for the purpose of vacating such proceeding. He has no standing to make such attack. It is only after the parties to such proceeding have made such stranger a party thereto that he may assert his rights.

The Circuit Court of Appeals cited no authorities in support of its view that petitioner could have raised the point in the *Brake Shoe* case without intervention therein, which latter course was admittedly not available to petitioner. The lower court cited several authorities on the proposition that, where an attack upon a decree is collateral, such attack will not be upheld, if the decree is not void, unless the party had no other recourse than such collateral attack. We submit that said cases are not in point.

In *Grant* v. *Leach & Co.*, 280 U. S. 351, a State Court made a decree appointing a receiver, who then brought suit against the defendant in the federal court. The defendant attacked the decree on the ground that the Court erred in appointing the receiver. It was held that the decree of the State Court, not being void, could not be attacked collaterally in the federal court. In the case at bar, however, not only was the petitioner's proceeding instituted in the

same court which appointed the receivers, but the parties to both the *Brake Shoe* case and the *Johnson* suit are identical.

The same distinction exists between the case at bar and *Lively* v. *Picton*, 218 F. 401, and *Wagner Electric Mtg. Co.* v. *Lyndon*, 282 Fed. 219, relied upon by the Circuit Court of Appeals.

In *Blake* v. *District Court*, 59 Fed. (2d) 78, also cited by the court below, the petitioner could have intervened in the district court to correct its alleged error, because in that case the entire proceeding was not attacked as void, but the claim was made merely that a receiver should not have been appointed without notice to petitioner. Furthermore, the question was not involved, as in the case at bar, whether the petitioner might not have instituted a separate proceeding to set aside the decree, because the petitioner did not attempt to do this, but applied instead to the Circuit Court of Appeals for a writ of certiorari. The Court said at page 79, in speaking of a writ of certiorari:

> "But it may not be used under this provision as a substitute for an appeal or writ or error to correct mere errors committed in the exercise of a lawful jurisdiction."

In other words, the Court merely held that a writ of certiorari was not the proper remedy to correct such error, but did not say that such error could not have been remedied in the district court by an independent bill.

> (b) *Even if petitioner could have appeared in the Brake Shoe case, without a formal intervention, to attack the decree therein, he also had the right to maintain an independent action in the same court for the purpose of such attack, in which the parties were the same as in the Brake Shoe case.*

Petitioner contends that the only recourse open to him to obtain the relief which he prayed for in his bill of complaint was by such independent proceeding, and, in any event, he was entitled to maintain it as an additional mode of obtaining such relief. We have shown that such independent proceeding was the only method by which the petitioner could obtain the relief he asked. However, there can be no doubt that under the authorities such procedure was justified, even though he might have asserted his rights in some other way.

In *State Trust Co.* v. *Kansas City P. & G. R. Co.*, 120 Fed. 398, cited with approval in *U. S.* v. *California Canneries*, 270 U. S. 553, *supra*, the Court said at page 407:

> "In so far as the intervenors ask for relief on the ground last mentioned, they manifestly seek to impeach the decree by depriving it of the effect of a decree of foreclosure, which it was intended to have, and by imputing to it an entirely different effect. They seek in this way to overthrow the decree, although they came into Court subsequent to its rendition, and ostensibly, at least, for the purpose of availing themselves of some of its provisions. This they should not be permitted to do, especially as they can readily enforce the rights which they now assert by an original bill, if such rights exist. As the intervenors were not parties to the foreclosure suit, they are not bound by the decree therein, if that action was not brought in good faith to secure the foreclosure of a mortgage but was brought, by collusion between the bondholders and stockholders of the old company, for the fraudulent purpose of enabling the stockholders to appropriate a part of the corporate assets, to the prejudice of the corporate creditors. If the decree is to be assailed on the ground, and such seems to be the second ground of assault—then it should be made by an original

bill, inasmuch as the general rule is that one who is not a party to a suit, but who intervenes, comes in in subordination to the record as he finds it, and will not be permitted to raise new issues or delay final action in the case, or insist upon a change in the form of the proceedings. (11 Enc. Pl. & Prac. 509, 510, and cases there cited.) If this is the rule as respects an ordinary intervention filed in advance of a final judgment or decree, much greater reason exists for requiring one to proceed by an original bill who comes forward after a final decree, and after third parties have acquired rights thereunder, and proposes to impeach it for reasons dehors the record."

In *Hopkins* v. *Lancaster*, 254 Fed. 190, cited with approval in *U. S.* v. *California Canneries, supra*, it was held that a stranger cannot intervene for the purpose of defeating the entire suit, not for the purpose of litigating with the complainant his right or title to any relief, and if it is desired to set up a new and independent claim, it must be done by an original bill in the nature of a cross bill.

We think a conclusive answer to the suggestion and finding of the lower court that petitioner should have appeared on the return day before Judge Manton on September 22nd, 1933 is that Elon S. Hobbs, a stockholder of Manhattan, endeavored to intervene in the *Brake Shoe* case by filing a petition for intervention, but Judge Manton refused to allow or act upon it (R. 326-328). The same treatment would undoubtedly have been accorded the petitioner had he sought to intervene or appear specially on the return day.

## X.

**Petitioner's bill of complaint stated a good cause of action cognizable in equity.**

It is not disputed that the District Court had jurisdiction of the *Johnson* suit. This cause was brought by a citizen and resident of Kentucky, which is a different state from the state in which all of the defendants resided at the time of the filing of the bill (R. 13), and the suit was instituted by him in his derivative capacity as a minority stockholder of the Manhattan, and in behalf of such other stockholders of Manhattan as might join herein and become parties thereto (R. 14).

The stock owned by complainant was of a par value of $10,000, so that the matter in controversy exceeded the jurisdictional amount of $3,000. However, in a derivative stockholder's action the amount in controversy is not the value of the stock of complainant, but the value of the entire corporate assets.

*Klein* v. *Wilson & Co., Inc.*, 7 Fed (2d) 772, affirmed 7 Fed. (2d) 777;
*Hutchinson Box Co.* v. *Van Horn*, 299 Fed. 424;
*Johnson* v. *Ingersoll*, 63 Fed. 2nd 86 (C. C. A., 7th).

There can, furthermore, be no doubt that a federal court, in the exercise of its general equity jurisdiction, has power to appoint a receiver on a stockholder's bill, to determine the corporation's solvency, and distribute its assets.

*Cole* v. *Philadelphia & E. Ry. Co.*, 140 Fed. 944 (reversed on other grounds, 149 Fed. 647);
*O'Neil* v. *Welch*, 245 Fed. 261 (C. C. A., 3rd Circuit);
*Klein* v. *Wilson*, 7 Fed. (2d) 777 (C. C. A., 3rd Circuit).

This is particularly true in this cause where the federal court has acquired jurisdiction over the *res*.

*O'Neil* v. *Welch* (*supra*).

Not only did the Court have jurisdiction in equity of the *Johnson* suit, by reason of the nature of the cause, but also because, at the time suit was instituted, the district court had taken possession through temporary acting receivers of the property of Manhattan, the latter's lines of railroad being in possession of Interborough, under lease.

It was seriously contended below that demand should first have been made upon the Manhattan receiver to bring the action before Johnson as a stockholder, suing on behalf of Manhattan, could institute the same. In other words, that Johnson should have asked (Roberts) one of the parties to the collusive arrangement by which Interborough was thrown into receivership, to assume the burden of attack on the Court which had appointed him as receiver a few days earlier. Such demand would have been futile, because Johnson in his bill of complaint attacks the appointment of said Roberts, as receiver of Manhattan, upon the ground that his appointment was unlawful, irregular and void. Roberts was the president of Manhattan at the time of his appointment and on November 9th, 1932, the said Roberts was ousted as president at a meeting of stockholders of said Company by an overwhelming vote (see note, *infra*, p. 4). Furthermore, in his bill of complaint, Johnson attacked the actions of the directors and officers of Manhattan who were also directors of Interborough and B. M. T., and, therefore, a request on Roberts to attack his own conduct, and that of his fellow directors in a suit to be brought by him, would have been denied and futile (R. 30-1; etc.).

It has frequently been held that, where there is antagonism between the directorate and the corporate interest, as in the case at bar, the requirements of Equity Rule 27 may be dispensed with. (See Opinion of Judge Woolsey, R. 709.)

> *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.*, 213 U. S. 435 (construing Equity Rule 94, now Equity Rule 27);
> *Ogden* v. *Gilt Edge Cons. Mines Co.*, 225 Fed. 723;
> *Whittaker* v. *Brictson Mfg. Co.*, 43 Fed. (2d) 485 (C. C. A., 8th Circuit).

Judge Woolsey after considering the sufficiency of the bill of complaint as well as the supplemental bills, declared:

> "In my opinion, the bill of complaint is not demurrable, but, on the contrary, sets forth good grounds in equity for the relief it asks" (R. 710).

The opinion of the Circuit Court of Appeals expressed no opinion on the sufficiency of the bills (R. 1035).

## XI.

### Petitioner's supplemental bill is not multifarious.

It was claimed below that the Johnson supplemental bill of complaint was multifarious, because it was alleged therein that the suit was brought on behalf of Manhattan stockholders, as well as bondholders, and "all others financially interested in said company". There are two answers to this contention: In the first place, this alleged objection was not made to the supplemental complaint in the

district court, and cannot be heard for the first time on appeal.

*Oliver* v. *Piatt*, 3 How. 333;
*Barney* v. *Latham*, 103 U. S. 205;
*Miller Rubber Co.* v. *Behrend*, 242 Fed. 515 (C. C. A., 2nd Circuit).

Secondly, causes of action existing on behalf of several plaintiffs, although not joint, may be united in one bill, where there are sufficient grounds for uniting the causes of action in order to promote the convenient administration of justice.

Equity Rule 26.

Since the adoption of said rule in 1912, it has been held that any parties whose rights are violated by a single act of the defendant, may unite in one bill for redress.

*International Organization, etc.* v. *Red Jacket C. C. & C. Co.*, 18 Fed. (2d) 839, 847-848 (C. C. A., 4th Circuit);
*Lion Laboratories, Inc.* v. *Campbell*, 34 Fed. (2d) 642 (C. C. A., 2nd Circuit).

In the first mentioned case, the Court cited with approval from *Kitchen & Co.* v. *Local Union*, 91 W. Va. 65, 70, in which the Court said:

> "If by the use of such methods, directed and applied to the business of each of the plaintiffs, all are prevented from prosecution of their respective enterprises, they all are similarly affected by the same illegal cause, wherefore they may unite in resisting it, and there is no misjoinder of parties plaintiff."

In the case at bar, Johnson and other stockholders and second mortgage bondholders of Manhattan, and Lillian Boehm, a bondholder of Interborough, were all affected by the acts of Interborough, of which complaint was made, and all had and have an interest in the *res,* which is in possession of the Court.

## XII.

### No order granting leave to sue the receivers was necessary and, in any event, Judge Caffey's order did not have to be obtained in the *"Brake Shoe* case".

If we consider that this question is before the Court, we contend that it was unnecessary to obtain leave to sue the receivers, where such receivers were appointed by the same Court as that in which the suit was brought, assuming that such appointment was valid.

> *Ambrose* v. *Brown*, 42 App. District of Columbia 25 (1914).

Leave to sue was unnecessary in any event under Section 66 of the Judicial Code, even though the *Johnson* suit did not relate to a cause of action arising from the conduct of the receivers themselves, or their agents.

> *Hall* v. *Wilson*, 35 Fed. (2d) 189.

But if such leave was necessary, the application did not have to be made to Judge Manton in the *Brake Shoe* case, for the unanswerable reason, that Johnson claimed and asserted that Judge Manton lacked the power to appoint such receivers in that case, and such receivers were all made parties to the *Johnson* suit for the express purpose of vacating the receiverships, and to have new receivers appointed for said properties.

## XIII.

### Jurisdiction was not destroyed by the intervention of Lillian Boehm in the *Johnson* suit.

The fact that Lillian Boehm, a citizen of the same State as several of the defendants in the *Johnson* suit, intervened by consent in the *Johnson* suit after the commencement of said proceedings, does not destroy the jurisdiction of the Court.

The Interborough receivers in the Court below contended that said intervention destroyed the jurisdiction of the Court, citing cases. However, none of said cases were in point for the reason that they were not class suits, as is the petitioner's cause; besides, in the suit at bar, the *res* was already in possession of the Court while in the cases relied upon by the respondents such was not the case.

The second reason why the intervention of Lillian Boehm did not destroy the jurisdiction of the Court is, that she was *not* a necessary party to the *Johnson* suit, even though she may be deemed a proper party.

The action was brought by Johnson on behalf of himself and all other stockholders of Manhattan who might become parties to the suit by leave of Court (R. 14-15). The petition of Lillian Boehm for intervention alleges that she is the owner of 1,400 shares of Manhattan stock (R. 139). The action of Johnson being brought for the benefit of all the stockholders and the corporation, it was unnecessary for her to intervene separately, in order that a complete determination of the issues raised by the Johnson bill of complaint could be had and, therefore, she was neither a necessary nor an indispensable party, and by her intervention, although she was a citizen of the same State as some of the defendants, could not destroy the jurisdiction of the Court after it had attached.

*Wichita R. & Light Co.* v. *Public Utilities*, 260 U. S. 48;

*Salem Trust Co.* v. *Mfgrs. Finance Co.*, 264 U. S. 182;

*Fraser* v. *Cole*, 214 Fed. 556 (C. C. A. 7th Circuit);

*Elder* v. *Western Mining Co.*, 280 Fed. 569 (C. C. A. 8th Circuit);

*Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2d) 991, 992 (C. C. A. 6th Circuit);

*Egyptian Noraculite Co.* v. *Stevenson*, 8 Fed. (2d) 576 (C. C. A. 8th Circuit).

## XIV.

**The Circuit Court of Appeals was in error in setting aside the consolidation order of Judge Woolsey.**

Although as shown under Point IX of this brief, the rights of the parties to the *Johnson* suit can be enforced by independent bill, without the aid of the consolidation of the *Johnson* suit and the *Brake Shoe* case, it was within the inherent power of Judge Woolsey and within his sound, reasonable and wise discretion to consolidate the two actions.

*Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, 292;

See—*Adler* v. *Seaman*, 266 Fed. 828, 831 (C. C. A. 8th 1920).

Section 734, Title 28, *U. S. Code* under which the District Court derives its power to consolidate causes, reads as follows:

"When causes of a like nature or relative to the same question are pending before a Court of the

> United States * * * the Court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, *and may consolidate said causes when it appears reasonable to do so.*" (Italics ours.)

Judge Woolsey acting under said provision of the Judicial Code in his discretion declared if ever there was an instance where an order of consolidation would be appropriate, it was in the *Johnson* and *Brake Shoe* cases (R. 711). The two causes were in the same court; all the parties to the *Brake Shoe* case were before him as defendants in the *Johnson* case; the causes were of a like nature and related to the same questions; both cases had a similar objective. It is not essential that the relief be identical in both causes. Under the language of the statute, a Judge may consolidate "when it appears reasonable to do so."

The case of *Adler* v. *Seaman*, 266 Fed. 828, upon which the respondents herein relied in their brief in the Circuit Court of Appeals is not applicable to the case at bar. In that case, at the time of consolidation, Seaman, a preferred stockholder of United Railways Company, filed a bill charging waste and maladministration by certain directors of the company, and seeking recovery of the assets so wasted and the removal of the directors. Issue having been joined, complainant moved for a receiver and an order was made appointing a Master to take testimony and report upon the advisability of such receivership. Thereafter, and before a report was made by such Master, one Adler, a bondholder of the company filed a bill against said company asking for a receiver, and the defendant having answered, admitting all of the allegations of the bill, a receiver was appointed in the *Adler* suit who took

immediate possession of the property. Thereupon Seaman made a motion asking that the two causes be consolidated and that the *Adler* suit be treated as an intervention in the *Seaman* case. This motion was granted and an order was entered allowing the consolidation of the two suits and ordering that the *Adler* suit be considered an intervention in the *Seaman* suit. This was held to be error. The reason given was not that the consolidation was not proper, but because that part of the consolidation order which made the *Adler* suit ancillary to the *Seaman* over the vigorous protest of the parties to the *Adler* suit, was erroneous. The Court said at page 838:

> "We know of no instance of an order forcing a pure intervention by unwilling parties, and we think that such an order cannot be made."

In the case at bar, no intervention was created by the "Consolidation Order", but each of the two causes consolidated by the order retained its full force and virtue as an independent cause.

It was not only "reasonable" in the language of Section 734 of Title 28 of the United States Code to consolidate said causes, but such consolidation avoids the unnecessary costs resulting from the trial of two causes separately.

> *MacGregor* v. *Johnson, etc., Inc.*, 31 Fed. (2d) 270 (C. C. A., 2nd).

The fact that Judge Woolsey ordered such a consolidation without request or motion by the *Johnson* complainant is not "unreasonable" within the meaning of the statute. The word "reasonable" used in the connection in which it is employed relates to the question as to whether there are sound reasons for ordering the consolidation, and not at whose instance the Judge acted.

Moreover, it can properly be said that the prayer for consolidation was included in the concluding general prayer of the *Johnson* bill for "such other and further relief as to the Court may seem just and equitable in the premises" (said by Judge Woolsey to be second only in its comprehensive scope to the Lord's Prayer), and was a direct request to the court to use such means of accomplishing the other prayers of the bill as the court may deem just and proper.

See

*The Gazelle and Cargo*, 128 U. S. 474, and cases cited herein.

## CONCLUSION.

***The decree of the Circuit Court of Appeals should be reversed, and the orders of Judge John M. Woolsey affirmed.***

Respectfully submitted,

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April, 1933.

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CHARLES ELMORE

Nos. 711 and 721

# Supreme Court of the United States

OCTOBER TERM—1932.

BENJAMIN F. JOHNSON,
Petitioner,

*against*

MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,

*against*

INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER
*of the*
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

## REPLY BRIEF OF PETITIONER-INTERVENOR, LILLIAN BOEHM, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PRESS OF FREMONT PAYNE, NEW YORK CITY

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## REPLY BRIEF OF PETITIONER-INTERVENOR, LILLIAN BOEHM, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Mention is made in the Receivers' brief (p. 6), of the filing of the petition herein on February 17th, 1933, after entry of the final order for mandate on December 29th, 1932. This delay is attributable largely to the non-cooperation and ob-

struction of the Interborough Receivers' counsel. The filing of eleven copies of the voluminous record herein was required to effect this application. Counsel for the Interborough Receivers had in their possession approximately 150 copies of the record in the Court below, printed at the expense of the receivership estate for possible use in this Court. Petitioners' attempt to borrow copies met with refusal. It was later ascertained that the Clerk of the Circuit Court of Appeals had sufficient copies on file which could be utilized for this application. Petitioners requested him to forward these records to this Court. When word of this reached Receivers' counsel, they interposed objections before the Clerk to such use of these records on file, claiming that they were the property of the receivers, and not of the Court, and could not be put to such use without their consent. Petitioners, after further delay, finally persuaded the Clerk, nonetheless, to send these records to this Court for use upon this application.

No prejudice, however, has resulted to the Receivers from the delay in making this application for certiorari, since it appears from their own note appended to their brief (p. 22), that the last important action in the receivership administration took place on December 29th, 1932, the same day on which the final order for mandate was entered herein, and that nothing of consequence has been done since.

Counsel observe that since Judge WOOLSEY's decision, the receivers have proceeded with the administration of the receivership, thus materially altering the situation and making impossible the restoration of the original *status quo*. While we claim that the orders of their appointment, and all acts done by them thereunder, are void, we have no desire or intention to question any proper

acts of the receivers done in connection with the care and management of the receivership estate, or to surcharge them therefor. No such purpose motivates this application.

*Replying to Receivers' Point One.*

Counsel assert that, assuming the Division of Business order is invalid, the Designation Order was unaffected thereby, and under this order Judge MANTON had power to appoint receivers. The Designation Order, however, merely empowered Judge MANTON to hold a District Court; when he entered the District Court he became bound by Rule 11a. His Designation Order gave him no greater power in the District Court than that enjoyed by the regularly appointed District Judges. Like all the other District Judges, he had no authority or jurisdiction to hear applications for the appointment of receivers unless assigned to the Motion Part, pursuant to Rule 11a. The Designation Order and the Division of Business order were dependent upon one another. If the first order was invalid, there could be no disagreement between Judge MANTON and the District Judges, upon which to found the Division of Business Order. On the other hand, if the second order was invalid, the designation order gave him no power to hear applications for receivers, for once in the District Court, he was bound by Rules 1a and 11a.

*Replying to Receivers' Point Two.*

The fact that Judge WOOLSEY refused to examine into the propriety of the Designation Order, and that the petitioners took no appeal from that

part of his order, does not foreclose the question from review by this Court, as counsel contend. If the Designation Order was void, it required no order to establish its invalidity. This could be shown at any time when acts done under it were brought under review. The designation order is of itself innocuous; its validity is of no moment until some definitive action (i. e., appointment of receivers) is taken under it. In considering the validity of such action, the invalidity of the Designation Order may then be shown.

Counsel erroneously assert that this Court is asked to determine the question of the existence in fact of public interest justifying the designation, upon mere *ex parte* assertions of its nonexistence made in a collateral suit. In the first place, these are not the *ex parte* assertions of the petitioners, but the assertion of none other than Judge MANTON himself, whose order is here attacked. They were made not in a collateral suit, but in the *Brake Shoe* case, the very case for which the designation was made. Both in Judge MANTON's opinion, and in Mr. Quackenbush's affidavit referred to therein, the sole public interest asserted was the unfounded fear that a trust company might be appointed receiver, which was not public interest at all.

In the Court below, we urged that public interest in fact must exist to justify the designation by the Senior Circuit Judge of a Circuit Judge to hold a District Court, under Sec. 22, Tit. 28, U. S. Code. In support, we pointed out that while Sec. 22 originally provided for designations if *in the judgment of* the designating judge the public interest required such designation, in like form as Secs. 17, 20, and 21, Tit. 28 (providing for designations of District Judges), Sec. 22 was

recast in 1922 so as to omit the words "whenever in the judgment of the Senior Circuit Judge," whereas the same provision in Secs. 17, 20 and 21 was continued unchanged. Judge HAND, though recognizing this legislative change, expressed doubt that it was intended to have the result of subjecting to scrutiny the designation of a Circuit Judge, and not the designation of a District Judge. The legislative change in this Section is clear. If the result be deemed undesirable or unsatisfactory, the remedy lies with Congress to correct this enactment, and it is *not for the courts to re-legislate into the Act the provision thus expressly omitted.*

It is said that designations have been made in the past for the trial of particular cases. In those instances, however, the District Courts to which designations were made had no rules similar to rule 1a and 11a. Those designations therefore have no application here. Furthermore it does not appear that any objection to these designations was made, or their propriety ever questioned, in the cited instances. In *U. S.* v. *Gill*, 292 Fed. 136, cited, a Circuit Judge was designated to hear a particular case, but there the District Judge sitting was disqualified because of interest from hearing that particular case. Since the designation was required by the necessities of a particular case, the designation was naturally directed to the hearing of that particular case, and, upon its conclusion the public interest which required the designation ceased.

*Replying to Receivers' Point Three.*

Authority for the adoption of Rules 1a and 11a is found not only in Sec. 731, Tit. 28, U. S. Code, but also in Sec. 27, Tit. 28, U. S. Code, and in

the inherent right and power of the District Courts to regulate and control their business.

These rules are not inconsistent with Sec. 13, Tit. 28, U. S. Code. Under these rules, the District Court, as a court of equity, remains open, but provision is made for the handling of the business specified in Sec. 13 by assignment of a particular judge of the Court. No proof was shown that at any time the judge holding the Motion Part was unavailable to any applicant for the appointment of a receiver. There is no inherent right in litigants to have the opportunity to apply to more than one judge of a particular court. Under Rule 11a, applicants for the appointment of a receiver are in no worse situation than are the litigants in two-thirds of all the districts in the country where there is only one district judge. The power given to any district judge by Section 13, to make certain orders, is expressly limited by the clause "according to the rules and practice of the court." The section merely grants *general* power, but the *exercise* of that power is limited by the rules and practice of the court. Any other interpretation would give rise to disputes among judges, conflicts of jurisdiction, and chaos.

These Rules are entirely consistent, as well, with Secs. 22 and 23, Tit. 28, U. S. Code. After a Circuit Judge is assigned to hold a District Court, he becomes subject to the rules of that court, and must transact such business as may be assigned to him under those rules. Once so designated, he becomes subject to the same obligations, duties, and restrictions to which any other District Judge is subject. He has no rights or powers superior to those of the other judges. The fact that he is the Circuit Judge, confers

upon him no standing superior to that of any of the numerous District Judges, who, from time to time, are assigned to hold a District Court within this District. The provision of the statute that a Circuit Judge, if assigned to the District Court, shall possess the powers and rights and perform the duties of a District Judge, does not mean that he has inherent right to perform any *particular* kind or class of business, or to hear any *particular cases*. It merely means that as to such judicial business as he transacts, he shall have the powers and perform the duties of a District Judge.

In *Ford* v. *Clarke*, 204 App. Div. 5 (affd. 236 N. Y. 606), all of respondent's contentions that Court Rules as to the assignment of business curtail the powers of a judge and prevent him from performing the duties of his office, were presented and rejected.

Rules 1a and 11a, for the same reasons already given, are not inconsistent with Secs. 17 and 18, Tit. 28, U. S. Code, relating to the designation of a district judge of another district when required by disability, necessary absence, or accumulation of business.

These rules do not conflict with Federal Equity Rule 6, providing for establishment of time and place for hearing of motions on notice. This rule has reference to districts having but one judge. Where there are several judges in the district, Sec. 27, Tit. 28, U. S. Code, authorizing the division of business, controls, and *the* judge assigned to hold the motion part, not *any* judge, is the judge referred to in Rule 6.

Respondents contend finally that Rule 11a is an equity rule, lacking the concurrence of a majority of the Circuit Judges, required by Federal

Equity Rule 79. There is nothing in the record however to show such lack of concurrence. We maintain furthermore that it is not an equity rule, but a general practice rule, regulating practice in applications for appointment of receivers not only in equity, but in bankruptcy and other causes. As Judge WOOLSEY said of Rule 11a, "It simply points to the door of the room where applications for receiverships must be made" (R. 714).

*Replying to Receivers' Point Four.*

Counsel urge that petitioners' remedy was to appear on the return of the rule *nisi* in the *Brake Shoe* case before Judge MANTON, and there challenge his jurisdiction or oppose continuance of the receivership, and if unsuccessful, to appeal.

We were not, however, required to pursue that course. Our contention is that the Designation and Division of Business Orders are void, and that Rules 1a and 11a are mandatory, so that Judge MANTON's assumption of jurisdiction and appointment of receivers were *coram non judice*, and therefore subject to attack by independent bill at any time.

Nor was the suggested course open to the petitioners. *The right to specially appear in an action is limited to those named as parties therein.* Strangers to litigation have no standing to appear generally or specially therein. The petitioners were strangers to the *Brake Shoe* case, and could become parties only by intervention. Intervention imposed subordination to, and recognition of, the propriety of the main proceeding, which would defeat at the outset any challenge to jurisdiction. *The "main" proceeding implied*

*not merely the relief sought as stated by Judge* HAND (R. 1033) *but included as well the propriety of all that had transpired before the intervention; it necessarily included the assumption of jurisdiction by Judge* MANTON *and his appointment of receivers,* whom the petitioners claim were "friendly" to Interborough and its counsel, and not impartial to the interests of all concerned as they should be (R. 24-26, 70-75, 105). These were the very subjects of petitioners' attack, and the basis of their objection to the proceeding.

Of the cases cited as authorities (p. 16), it will be noted that in the *Pacific Northwest Packing* case, the attack upon the receivership was made by a party to the action; in the *Mitchell* case, it was made by one brought into the action by service of process; and in the other two cases, the standing of the litigant and his right to question the propriety of the receivership in the proceeding were not raised or adjudicated.

In stating at page 16, that Mr. Boehm and Mr. Franklin appeared before Judge MANTON on September 6, 1932, counsel failed to mention that this was in an entirely separate action, *Barber* v. *Manhattan Ry. Co.*, and not the *Brake Shoe* case.

*Replying to Receivers' Point Five.*

The facts supporting the charge that the proceeding for appointment of receivers was a collusive one to obtain friendly receivers, were before the Courts below (R. 70, 72, 74, 75, 24, 25, 26).

The point was raised directly in the brief of Johnson's counsel upon the appeal in the Court below (Point XVI, pp. 53-57).

Whether or not this point was discussed in the Court's opinion below, it has been properly raised, and is properly before this Court for determination.

## CONCLUSION.

**The petition for a writ of certiorari should be granted.**

Respectfully submitted,

ELLIOT S. BENEDICT,
Counsel for Petitioner-
Intervenor Lillian Boehm.

LOUIS BOEHM,
SAMUEL ZEIGER,
DAVID RASCH,
of Counsel.

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CHARLES ELMORE

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. 711 and 721.

BENJAMIN F. JOHNSON, Petitioner,
LILLIAN BOEHM, Petitioner-Intervenor,
*against*
MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,
*against*
INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER
*of the*
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

## BRIEF OF PETITIONER, LILLIAN BOEHM, ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS BOEHM,
Counsel for Petitioner,
Lillian Boehm.

LOUIS BOEHM,
HARRY SHULMAN,
SAMUEL ZEIGER,
HARRY M. EDELSTEIN,
ELLIOT S. BENEDICT,
of Counsel.

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IN THE

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OCTOBER TERM, 1932.

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BENJAMIN F. JOHNSON, Petitioner,

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## BRIEF OF PETITIONER, LILLIAN BOEHM, ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

This case comes to this Court on certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit, entered on December 14th, 1932, reversing three

decrees of the District Court, Southern District of New York (R. 1036).

The petition of Johnson, complainant in the above first entitled action, for a writ of certiorari, was filed on February 18th, 1933 (No. 711), and the petition of Lillian Boehm, plaintiff-intervenor in said action, was filed on February 23rd, 1933 (No. 721). Both petitions were granted and certioraris allowed on March 20th, 1933 (R. 1049).

## Opinions Below.

The opinion of the District Court, by Judge Woolsey, is reported in *1 Fed. Supp.* 909, and appears in the Record before this Court at page 694. The opinion of the Circuit Court of Appeals, by Judge Hand, reversing the decrees of the District Court is reported in *61 Fed.* (2d) 934, and appears in the Record at page 1024.

## Statement of the Case.

### Relationship of Interborough and Manhattan.

The Manhattan Railway Company, herein called Manhattan, is a New York corporation owning a system of rapid transit elevated lines in New York City. It has outstanding $60,000,000 of capital stock; $40,680,000 Consolidated First Mortgage 4% Bonds, and $4,523,000 Second Mortgage 4% Bonds (R. 23, 159, 160).

On January 1st, 1903, Manhattan leased its railroads to the Interborough Rapid Transit Company, a New York Corporation, herein called Interborough, for a term of 999 years. This lease provided that as rent Interborough shall pay all taxes imposed upon Manhattan and its property, also principal and interest on its bonds, and a 7% dividend upon its stock. Under the so-called Readjustment Plan of 1922, this "guaranteed" 7% divi-

dend was modified to a 5% dividend, payable if and when earned (R. 26-29).

Interborough operates an extensive system of rapid transit railroads in New York City. The lines are of two kinds: the first, the Manhattan elevated leased lines, and the second, elevated and subway lines owned by the City of New York and leased to Interborough, and partly owned by Interborough (R. 153-156).

Interborough has outstanding capital stock of $35,000,000; $132,000,000 First and Refunding Mortgage Bonds, secured by first mortgage on the Manhattan and municipal leases and the Interborough's equipment; plus an additional $5[illegible],000,000 of these bonds pledged to secure an outstanding issue of $32,000,000 approximately, of Ten-Year Secured Convertible 7% Gold Notes; and $10,000,000 of 6% Notes due October 1, 1932 (R. 158, 159).

Under this lease arrangement, Manhattan became a mere corporate shell and has so continued since 1903. It has no managing or operating personnel. Its properties and business are completely under Interborough control and have been since the latter took it over lock, stock, and barrel in 1903. Three of the four members of its Executive Committee are Interborough directors. Interborough, for years, has sacrificed Manhattan's interest for its own financial benefit, flagrantly violating its obligations under the lease. It failed to operate modern cars over the Manhattan lines as it does upon its own lines. It permitted the Manhattan stations and properties to become dilapidated in appearance compared with its own, notwithstanding a specific duty imposed under the lease "to keep the properties in good condition and repair, so that the business of the leased railways shall be preserved, encouraged and developed * * *." Its failure to provide modern and comfortable cars and to keep up the appearance of the physical properties reacted to Manhattan's detriment and Interborough's

benefit, in that passengers seeking comfort and safety turned to the use of the subway rather than the elevated lines (R. 59-61).

The Manhattan lease, which for many years had been vastly profitable to Interborough, it now claims to consider burdensome. It attributed its financial loss sustained in operation to the Manhattan lines. Statements were made in its behalf and frequent items appeared in the press and elsewhere that Interborough would cut loose from the Manhattan lines. The charge has been made and freely circulated in the public press and in financial and statistical publications that Interborough has for some time planned to drop the Manhattan lease, and that to accomplish this result, it placed itself in the hands of equity receivers, who, as such, might disaffirm the lease (R. 36, 41-42, 57).

In April, 1932, instructions were issued by J. P. Morgan & Company, the Interborough bankers, that the real estate and franchise taxes of Manhattan, due May 1, 1932, amounting to $860,000 were not to be paid although at that time Interborough had in its treasury approximately $5,000,000 and was well able to pay the same (R. 70, 682). The three directors of Manhattan who were also on the Interborough Board voted for a resolution to carry this instruction into effect. Incidentally, the senior member of this banking firm is the Chairman of the self-appointed 5% Bondholders and 7% Noteholders "Protective Committees" of Interborough, whom their counsel have sought to describe as "innocent victims of this controversy" (R. 189-192).

This purposeful non-payment of the Manhattan taxes which fell due May 1, 1932, cast before it the shadow of a threatened default in Interborough's payment of the semi-annual interest of $813,660 on Manhattan's first mortgage bond issue which was to become due on October 1, 1932. Non-payment would constitute a default unless cured within sixty days, and would entitle the

trustee and the bondholders to exercise a right of acceleration of principal of the mortgage (not due for 58 years), and the sale of the Manhattan property at public auction (R. 34, 35, 36).

Against this background, we may now view the proceedings which took place in the District Court, which are now under review.

## The Brake Shoe Case.

On June 30th, 1932, Rules 1-a and 11-a of the General Rules of the District Court, for the Southern District of New York, were adopted by all the eight judges of the District, effective July 1st, 1932, and an appropriate order signed by all the District Judges duly entered (R. 702). Rule 1-a provided:

> "Any judge designated to sit in the District Court for the Southern District of New York shall do such work only as may be assigned to him by the Senior District Judge" (R. 702).

Rule 11-a provided:

> "All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (* * *) shall be made to the judge assigned to hold the Bankruptcy and Motion Part of the business of the Court, *and to no other* judge" (R. 702). (Our italics.)

They were adopted pursuant to Sections 731 and 27, Title 28, U. S. Code.

Section 731 grants the District Courts statutory power to enact rules to "regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

Section 27 empowers the District Courts to provide for the division of their business. It reads:

> "In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; *but in case they do not so agree,* the senior circuit judge of the circuit in which the district lies, shall make all *necessary* orders for the division of business and the assignment of cases for trial in said district." (Our italics.)

On June 29th, 1932, two schedules were filed in the Clerk's office setting forth the assignment of judges and the division of work in the District Court for the year just begun, signed by all the District Judges (R. 701).

Under this agreed division of business, Judge Patterson was assigned to hold the Bankruptcy and Motion Part from August 15th to 29th, 1932 inclusive (R. 702).

On August 25th and 26th, 1932, Judge Patterson was in Court or in his Chambers throughout the day, functioning in all respects as Judge of the Motion Part, ready to deal with any applications for equity receiverships (R. 702).

On August 25th, 1932, "Interborough" counsel, and counsel for its simple contract creditor, American Brake Shoe & Foundry Company, attended before Judge Manton, Senior Circuit Judge, in his Chambers, and requested him to designate himself to hold a District Court so that he could entertain an application for the appointment of receivers in a creditor's action about to be brought. They presented an affidavit of Interborough's counsel, entitled in that action, though not yet begun, stating as the ground for this unusual request his fear that Judge Patterson might possibly appoint a trust company rather than an individual as receiver (R. 175; 1 Fed. Supp. 820, Manton, J.).

Judge Manton gave prompt response to this request. On the same day, August 25th, 1932, he signed two orders as Senior Circuit Judge, which we shall call the "Order of Designation," and the "Division of Business

Order." By the first order, acting upon his own initiative, without any representation from the Senior District Judge, and without making any inquiry of Judge Patterson, he found that the "public interest' 'required him to designate himself to hold a District Court commencing on that day "particularly to hear and determine all applications and proceedings in the matter entitled "American Brake Shoe & F. Co. v. Interborough R. T. Co.," as yet not commenced, and accordingly he so designated himself. The order recited as its authority, 28 U. S. C. A., §22, which provides that the Senior Circuit Judge may, *if the public interest requires*, designate or assign any Circuit Judge to hold a District Court within the circuit (R. 702-705).

Having thus become by self-designation a judge with District Court jurisdiction, he thereupon reported to himself as Senior Circuit Judge, that Judge Manton, acting as District Judge, disagreed with the division of business of the District Court, and thereupon, as Senior Circuit Judge, he signed the second order that for thirty days thenceforward applications for appointment of receivers could be made not only before the District Judge assigned to the Motion Part under Rule 11-a, but also to himself, acting as District Judge (R. 178). The order recited as its authority the Judicial Code, Sec. 23 (28 U. S. C. A., §27).

These two orders, bound together under one cover, and so interlocked and combined in their common purpose as to be regarded as one order, were filed on the following day, August 26th, 1932, in the Clerk's office (R. 715).

On the same day, August 26th, the Brake Shoe company filed its creditor's bill against Interborough, upon a simple contract claim of $27,000, praying for an equity receivership (R. 153, 170). On the same day, Judge Manton, upon this bill and Interborough's consent, signed an order appointing Victor J. Dowling, and Thomas E. Murray, Jr., temporary receivers of Interborough, and

reserving to himself full right and jurisdiction over the cause (R. 180, 184, 705, 715). He made a further order on the same day appointing Chadbourne, Stanchfield & Levy, as receivers' counsel (R. 185).

No application for a receivership order in the Brake Shoe case was made to Judge Patterson at any time on August 25th or 26th, nor did Judge Manton, as District Judge, apply on either of those days to Judge Knox, as Senior District Judge, under Rule 1-a for an assignment of the Court's business, or for an assignment specifically to hear the Brake Shoe case (R. 717, 718).

A poll of all the District Judges disclosed that there was no disagreement among them as to the division of business (R. 717).

Subsequently, on September 6th, 1932, Judge Manton extended the receivership to the Manhattan Railway upon its application and consent, and appointed William Roberts, Esq., as receiver of Manhattan, subject to Interborough's rights and possession, and expressly without prejudice to any right of Interborough or its receivers to disaffirm its lease with Manhattan (R. 196, 198).

Both receivership orders contained show cause provisions returnable September 22nd, 1932, for continuance of the receiverships *pendente lite* (R. 184, 200). On September 28th, 1932, Judge Manton continued them *pendente lite*, and extended the equity term until termination of the Brake Shoe proceedings under these receiverships, or, in any event, for three years thereafter, and reserved to himself full and exclusive jurisdiction of the cause (R. 223-5).

Petitioners contend that the Brake Shoe suit is a collusive action brought by Interborough through the "friendly" auspices of the Brake Shoe Company appearing in the guise of a plaintiff; that the ultimate purpose of the action was to enable Interborough to rid itself of the burdensome obligation of the Manhattan lease. Petitioners contend that Interborough and its bankers further

planned, through the instrumentality of receivers friendly to and controlled by them, to permit a default in the payment of Manhattan First Mortgage interest and taxes, with a resultant foreclosure of the Manhattan properties, the wiping out of $5,000,000 of Second Mortgage Manhattan Bonds, and of $60,000,000 of Manhattan stock, and the forced sale of the Manhattan's valuable properties, which Interborough's bankers could buy in for a nominal sum, giving Manhattan's First Mortgage bondholders a fraction of what was due them, and completely wiping out the stockholders and junior bondholders. The Brake Shoe suit, petitioners contend, was brought for the immediate purpose of placing Interborough in the hands of receivers "friendly" to its present management and its bankers, and sympathetic to its purposes and policies.

The Brake Shoe bill showed that plaintiff was a simple contract creditor for $27,000. Interborough, with aggregate assets of $500,000,000 at the time, had over $5,000,000 cash on hand, out of which it could well have paid this indebtedness (R. 74, 75, 78). The allegation of demand and refusal in the bill was a sham and pretext to create an appearance of controversy when none in fact existed. The parties on the contrary were actually cooperating to achieve a common result. Furthermore, its claim was based upon the sale of brake shoes and castings used in operating the lines (R. 164). For operating expenses, Interborough had a special fund available under contracts with the City (*Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 196, 198). Under these circumstances, Brake Shoe had no right to a receiver in equity for general assets unless this special fund was exhausted or insufficient, of which no allegation was made.

No claim was made in the Brake Shoe bill that the Interborough had attempted to obtain an extension of the notes which were shortly to mature. On the contrary, it appears affirmatively from the affidavit of Louis Boehm, that no such request was made either to him or

Lillian Boehm, his wife, the holder of a substantial amount of these notes (fol. 2055). On a previous occasion of financial stress, in 1922, when Interborough's Secured Convertible 7% Gold Notes became due, it sought and obtained from its bondholders an extension of these notes, and from Manhattan's stockholders their assent to the modification and reduction of the guaranteed dividend rental.

That the Brake Shoe Bill was prepared at Interborough's request and in collusion with it, may be readily inferred from the filed papers themselves. Highly elaborate petitions and orders for the appointment of receivers and counsel were presented on August 26th to Judge Manton (R. 180, 185, 706). The voluminous bill of complaint was verified on August 25th, 1932 (R. 170). The bill and answer were filed August 26th (R. 715). The bill set forth in great detail Interborough's assets, obligations, financial structure, indebtedness, resources, and solvency, all upon information and belief; the verification was made by plaintiff's Assistant Treasurer, and no source of information was stated other than the general allegation that he had made inquiries concerning Interborough's present condition, and from such inquiries had learned the facts alleged (R. 170). The affidavit of Mr. Quackenbush, the receivers' petition for appointment of counsel, and the affidavit of Mr. Chadbourne, receivers' counsel, were all notarized by a single notary public, Mr. Peacock, an attorney regularly employed in the office of Mr. Quackenbush, Interborough's counsel (R. 176, 233, 235). Plaintiff expressly waived answer under oath (R. 169).

Chadbourne, Stanchfield & Levy, appointed as Interborough Receivers' counsel, were for several years last past closely associated with Brooklyn-Manhattan Transit Company, which owns a large block of Interborough stock. The Chairman of its Board of Directors is likewise Chairman of Interborough's Board. Interborough,

Manhattan, and Brooklyn-Manhattan have directors in common (R. 24, 72, 120). Mr. Charles L. Hayden is director in all three companies; he is senior member of the banking firm of Hayden, Stone & Co., and, incidentally, is Chairman of the so-called Protective Committee for the Interborough Ten-Year 6% Gold Notes (R. 59, 193). Mr. Chadbourne had been, for the past several years, special counsel for Brooklyn-Manhattan, and also counsel for Hayden, Stone & Co. But a few days before the filing of the application for receivership herein he represented Brooklyn-Manhattan before the Transit Commission (R. 24, 72, 120).

On October 10, 1932, after commencement of the Johnson suit, and the service of the show cause order to vacate the appointment of the Interborough receivers and counsel, Mr. Chadbourne resigned as counsel for Interborough receivers (R. 548-550).

Judge Dowling, when appointed receiver, or at least very shortly prior thereto, was a partner in Mr. Chadbourne's firm, whose close interest and associations with Interborough, Brooklyn-Manhattan and Hayden, Stone & Co. have been already described. When appointed, he was sojourning in Europe, and Mr. Chadbourne made public statement to the effect that Judge Dowling's appointment as Receiver would probably necessitate the severance of his connection with the Chadbourne firm. On his return from abroad on September 7th, when interviewed by the press, Judge Dowling made the statement that he was not certain whether he would have to resign from the firm. His affidavit of qualification circumspectly failed to state when in fact he did resign (R. 24, 72, 73, 498).

The appointment of Mr. Roberts as Manhattan Receiver was sponsored by Interborough-Brooklyn-Manhattan Transit interests. At the time of such appointment he was president, director and counsel of Manhattan, and for some time prior thereto, it is alleged, was under the domination and control of the Brooklyn-Manhattan and

Interborough interests. Practically throughout his tenure of office, while Interborough flagrantly violated the Manhattan lease, he stood by passively and did nothing (R. 25, 70-72).

The Interborough receivers have faithfully pursued the Interborough's policies. Under the protection of the Court's decree against interference, they have kept possession of Manhattan's properties, collected the Manhattan income, yet failed to pay the Manhattan taxes and mortgage interest, representing in part the lease rental, so that a default for non-payment of interest on the Manhattan First Mortgage occurred on Oct. 1, 1932. Their attitude would have caused a foreclosure with the consequent wiping out of the Manhattan leasehold, its second mortgage bonds, and the stock, had not Judge Manton upon the application of the Mortgage Trustee, and on the recommendation of Basil O'Connor, as Special Master, on the last day of the grace period directed the receivers to make payment. On April 1st, 1933, the first mortgage interest again fell due and the Interborough receivers have again suffered a default, placing the Manhattan bondholders and stockholders again in the same jeopardy.

### The Johnson Suit and the Boehm Intervention.

On September 21st, 1932, a day before the return of the rule *nisi* in the Brake Shoe case, Benjamin F. Johnson, a citizen of Kentucky, and holder of 100 shares of Manhattan, filed his bill of complaint in a representative Manhattan stockholder's action against the Interborough, joining all the parties in the Brake Shoe case, including the Manhattan and Interborough Receivers, and alleging, among other things, that the orders of Judge Manton, particularly the order of designation, order of division of business, and orders appointing receivers, were void and beyond his jurisdiction, since he lacked power to make the first two orders, and had violated Rules 1a and

11a in appointing receivers. The bill alleged also the facts, above set forth, charging that the Brake Shoe suit was a friendly, collusive, arrangement aimed at the ultimate abrogation of the Manhattan lease and the appointment of friendly receivers sympathetic to Interborough's purpose. The bill prayed that these, and all subsequent, orders of Judge Manton in the Brake Shoe case be vacated and set aside, that new receivers independent of, and disassociated with, the Interborough, or Brooklyn-Manhattan Transit Company, and their respective officers, bankers, or counsel, be appointed, and for an accounting between Manhattan and Interborough, and other general relief. Johnson later filed a supplemental bill and supplemental petition amplifying his Bill and further supporting its prayer (R. 13-48, 49-66, 69-76).

On the same day, September 21st, 1932, Lillian Boehm, holding 1,400 shares of Manhattan stock, $117,000 of the Manhattan First Mortgage Bonds, and $60,000 Interborough First Mortgage Bonds, and $35,000 of Interborough Secured Convertible 7% Gold Notes (which matured September 1st, 1932, and were then in default), by leave granted, duly intervened as party plaintiff in the Johnson suit (R. 137). She filed a supplemental bill as a secured Interborough creditor, based upon the same general grounds as the Brake Shoe bill, but in addition alleged that the proceedings in the Brake Shoe case were void and prayed the vacation of Judge Manton's orders of August 25, 1932, and all his subsequent orders in the Brake Shoe case, and for the appointment of new receivers for Interborough, and new counsel for such receivers, independent of and disassociated from Interborough, Manhattan, Brooklyn-Manhattan Transit Co. and their officers, bankers, attorneys, and counsel (R. 80-113).

On motion of Johnson and Boehm, upon three orders to show cause, Judge Woolsey vacated all the decrees of Judge Manton in the Brake Shoe case upon the ground that his actions in the District Court were *coram non*

*judice* (R. 114, 123, 130, 725, 694-725; *1 Fed. Supp.* 809). He refused to vacate Judge Manton's Order of Designation and Order for the Division of Business, on the ground that, being orders of the Senior Circuit Judge, they were beyond his jurisdiction to vacate. He withheld the appointment of new receivers, however, pending appeal from his decision, but provided if no appeal be taken within twenty days, or his decision be affirmed on appeal, that application may be made under Rule 11a to the Judge then sitting in the Motion Part for the appointment of new receivers. Before entering the vacating decrees, Judge Woolsey, on his own motion, entered a decree consolidating the Johnson suit with the Brake Shoe suit (R. 697-8, 722).

On appeal to the Circuit Court of Appeals, Second Circuit, Judge Woolsey's orders were reversed (61 Fed. 2d, 934). The review of this determination is now sought.

## POINT I.

**The issues in this case concern not merely the private rights of the party litigants. They touch the fundamental proprieties in the internal administration of the Federal District Courts and arise from a continuing conflict with reference thereto between the Senior Circuit Judge and the eight district judges of the Southern District of New York. This Court should not, therefore, minutely scrutinize the procedure by which the occasion is presented to it, but should exercise its broad supervisory power over equity practice and jurisdiction in the lower federal courts and preserve the moral economy of the federal judicial system from the degeneration threatened by the situation exemplified in this case.**

The Circuit Court of Appeals reversed the orders of the District Court, not on the merits of the real controversy involved in this case, but on the technical pro-

cedural ground that the petitioners misconceived the remedy for the adjudication of the controversy; that petitioners should have raised their objections by intervention in the receivership proceeding rather than by the bill in equity which they filed. We believe, and will presently urge, that the Circuit Court of Appeals erred in so holding; that petitioners chose a proper remedy; that under it they were entitled to relief; and that the Court of Appeals erred in directing dismissal of their bill.

It should be observed first, however, that the approach employed by the Court of Appeals is inappropriate for the problems involved in this case and should not prevail in this Court.

It is true that, in form, the issues presented by the case arise in a litigation between private parties. In truth, however, the issues concern not alone the conduct of the parties but more particularly, what Judge Woolsey called the "domestic economy" of the district court. They relate not to matters of private right and obligation dependent on the transactions and conduct of the parties litigant, but to the internal management of the Court, the internal administration of its business, irrespective of the parties' acts and transactions. The problems presented arise not from a conflict of opinion on the rules of law which should govern the conduct of the parties, but from a conflict between the Senior Circuit Judge and the eight district judges on how the business of the district court is to be administered—how it is to be distributed among the judges holding district courts.

In a case of as great economic, social and even political significance as that of the Interborough receivership, it is of the utmost importance that the proceedings of the federal court be free of any suggestion of impropriety or irregularity. The federal judicial system is charged with a highly delicate task vital to the success of our federal form of government. It should not be subjected to any

avoidable disturbance from a case with such explosive power as is instinct in this receivership. If, then, the incidence of the situation herein disclosed were limited entirely to this case, the situation would still call for the exercise by this Court of its supervisory and corrective powers. But the incidence of the situation is not so limited. This case is but an instance of a continuing conflict and practice which threatens to destroy the morale of the administration of the district court by the judges appointed thereto and undermine the confidence in the integrity and traditions of the federal bench and bar.

For, the Senior Circuit Judge has, in this case, emphatically declared his intention to continue to act as he has done here. (See his opinion, 1 Fed. Supp. 820.) And the eight district judges, by the unanimous adoption of Rule 1-a (to be discussed later) have emphatically declared their opposition to such conduct and their will to stop it.

To approach the problem presented by this situation from the point of view of whether the parties have properly raised the issue is, then, to misconceive the problem and shut out the light which should guide the attempt at solution. Respondents as well as petitioners should be anxious to have this issue of vital public importance squarely met and decided without resort to evasive and frivolous technicalities. Respondents should join petitioners in asking this Court to decide the fundamental issue and safeguard the administration of this receivership and the federal judicial system against charges of impropriety.

This Court has broad supervisory and corrective powers over the jurisdiction and administration of the lower federal courts. Sometimes, this power is exerted through the issuance of writs of mandamus or prohibition. See

*Ex parte Northern Pacific Ry.*, 280 U. S. 142;
*Ex parte Metropolitan Water Co.*, 220 U. S. 539;

*In re Winn*, 213 U. S. 458;
*Ex parte Skinner & Eddy Corp.*, 265 U. S. 86;
*Ex parte United States*, 287 U. S. 241;
*Sloss "Mandamus in the Supreme Court"* since the Judiciary Act of 1925, 46 Harv. L. Rev. 91.

But the power is not limited in its exercise to any one method. In matters of this sort, the Court may exercise this power whenever it perceives the situation and is in a position to correct it by its decree.

Thus, it is the established and traditional practice of this Court in cases coming before it to scrutinize matters of federal jurisdiction below, even of its own motion and even against the desire of the parties to the action.

*Hilton* v. *Dickinson*, 108 U. S. 165;
*Mansfield, Coldwater & Lake Mich. Ry.* v. *Swan*, 111 U. S. 379;
*Cameron* v. *Hodges*, 127 U. S. 322;
*Stratton* v. *St. Louis Southwestern Ry.*, 282 U. S. 10;
*Smith* v. *Wilson*, 273 U. S., 388;

In equity matters particularly may the power of supervision be freely exercised. This Court has paramount power, within the limitations of applicable statutes, to prescribe rules of practice for equity cases in the lower federal courts.

See:

28 U. S. C. A., Sec. 723;
28 U. S. C. A., Sec. 730;
*Lane*, "Federal Equity Rules", 35 Harv. L. Rev. 276;
*Griswold & Mitchell*, "The Narrative Record in Federal Equity Appeals," 42 Harv. L. Rev. 483.

And it may prescribe rules for the conduct of lower federal judges in such cases.

See:

*Equity Rule 70½*, 281 U. S. 773;
cf. *Admiralty Rule 46½*, 281 U. S. 773.

The scope of this Court's power of review in equity cases is unlimited. It may review questions of fact as well as law and correct any errors which, in its opinion, require an exercise of its powers.

*Buckingham* v. *McLean*, 13 How. (U. S.) 150;
*Dodge* v. *Knowles*, 114 U. S. 430, 434;
*Virginian Ry.* v. *United States*, 272 U. S. 658, 675;

and see

*Frankfurter and Landis*, "The Judiciary Act of 1925", 42 Harv. L. Rev. 1, 29.

It may of its own motion take the objection of want of equity jurisdiction.

*Lewis* v. *Cocks*, 23 Wall. 466.

See

*Twist* v. *Prairie Oil Co.*, 274 U. S. 684, 690.

It may reverse a decree below and remand a case for the observance of a practice deemed by it desirable even when not promulgated in the form of a rule.

*R. R. Comm. of Wis.* v. *Macxy*, 281 U. S. 82;
*Pub. Serv. Comm. of Wis.* v. *Wis. Tel. Co.*, decided at this Term March 27, 1933;
cf.; *Panama Mail S. S. Co.* v. *Vargas*, 281 U. S. 670.

One of the established reasons which this Court has stated may measure its discretion to grant certiorari is that a circuit court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." General Rules, Rule XXXVIII, 5(b).

We submit that, for the reasons to be stated at once, the situation presented by this case, of utmost importance to the jurisdiction, administration and moral stability of the federal district courts, is before this Court and calls for an exercise of its supervisory power.

## POINT II.

**The Circuit Court of Appeals erred in assuming that Judge Manton's orders could not be set aside unless it were found that they were so wholly lacking in jurisdiction as to be subject to attack at any time in any court and in any proceeding.**

The Circuit Court of Appeals assumed that in order to grant petitioners equitable relief it would have to find that the proceeding before Judge Manton was a complete "nullity" and could be ignored as a "futility", "a phantom suit which would settle nothing and on whose results (the parties) might not later rely". This it believed it could not find. Without ~~their~~ passing, then, on the validity of Judge Manton's orders or the rules of the district court, the Court of Appeals held that there was sufficient "color of authority" for his conduct so as to prevent attack in the manner adopted by the petitioners—even though his acts were so invalid and improper as to authorize their reversal in procedure suggested by the Court. Respondents' counsel are satisfied and even urge that the legality of this receivership, perhaps the largest witnessed in the Southern District of

New York and among the largest in the country, be left in this state of dark doubt and suspicion.

This assumption by the Circuit Court of Appeals was wholly unwarranted and erroneous. The challenge of Judge Manton's acts was made *in limine*, while his acts were still interlocutory and before anything had been done under the receivership which created a situation that could not fairly be disturbed. Petitioners were not seeking a complete disruption of the receivership proceedings. Substantially they sought only a removal of the proceedings to the proper district judge and an appointment of different and independent receivers. The challenge was not made collaterally in another suit between different parties, as incidental to other relief. Nor yet was it made in a different court. Petitioners challenged Judge Manton's conduct not only in its incipient stage but in the same court in which the receivership proceeding was pending and with all persons who were parties to the Brake Shoe case as parties in their action. Such a challenge cannot be analogized to a collateral attack upon a final judgment entered in another suit.

It is true that petitioners attacked Judge Manton's acts as lacking in jurisdiction and prayed that they be set aside as null and void. But their allegations are to be taken in connection with the prayer for relief and the circumstances in which they were made. Under the limitations just indicated, petitioners attacked Judge Manton's acts as lacking in jurisdiction. They are not required to urge, nor is the Court required to hold, that the invalidities pointed out in Judge Manton's orders had any further and more serious effect than to render them invalid if attacked at the outset. They are not required to urge, nor is the Court required to hold, that had no challenge of Judge Manton's orders been made at the time and in the manner above stated, all acts in the receivership could have been avoided and "ignored as futilities".

**A. Petitioners' prayers before Judge Woolsey may be regarded and are properly sustainable as petitions in equity to set aside the orders under the traditional jurisdiction of equity courts to enjoin and set aside judgments, orders or decrees on grounds of fraud, mistake or impropriety sufficient to invoke an exercise of the Court's discretionary power.**

Courts of equity have traditionally set aside, or enjoined the enforcement of, judgments, orders or decrees procured by fraud, through mistake of the injured party, or by other improper conduct which rendered enforcement of the orders unconscionable.

See *e. g.,*

*Johnson* v. *Waters,* 111 U. S. 640;
*Marshall* v. *Holmes,* 141 U. S. 589;
*Phillips* v. *Negley,* 117 U. S. 665, 674.

Orders, judgments or decrees thus set aside are undoubtedly not lacking in jurisdiction in a sense that they are nullities, that they may be ignored as "futilities or phantom suits" and may be attacked collaterally in other suits between the same or different parties where other objects are sought. Yet they are set aside by equity courts in suits instituted directly for that purpose.

Indeed in construing petitioners' challenge of Judge Manton's orders as collateral within the meaning of the prohibition against collateral attack, the Circuit Court of Appeals misconceived the established distinction between direct and collateral attacks subsumed in that prohibition. As stated by the authoritative treatise on the subject:

> "The object, of course, in which the suit or action is brought is a determining factor. If instituted for the very purpose of setting aside, correcting or modifying the judgment, it is usually regarded as a direct attack, for the attack upon the judgment in such case is not incidental to the object of the pro-

ceeding, and the end of the proceeding is not something collateral to the judgment."

*1 Freeman on Judgments* (5th Ed. pp. 606-7).

In *Marshall* v. *Holmes* and *Johnson* v. *Waters, supra,* judgments were set aside, in separate suits instituted for that purpose, under circumstances very much weaker than those in the case at Bar. In those suits, this Court affirmed decrees of lower federal courts setting aside final judgments of *state courts* who concededly and beyond question had jurisdiction to enter those judgments—and which judgments purported finally to adjudicate the controversies involved.

In the case at Bar the same Court in which the challenged orders were entered was asked to set them aside. And the orders thus challenged were not final judgments purporting definitely to settle the controversy but were the initial steps in the inauguration of a proceeding contemplated to extend over a period of several years.

In a later portion of this brief, the improprieties and invalidities underlying Judge Manton's orders will be established. Suffice it here to point out that the Circuit Court of Appeals erred in holding that petitioner's challenge was collateral and that it was foreclosed from considering the grounds of the challenge by the supposed prohibition against collateral attack. In the exercise of its discretion this Court has the power to decide what the Circuit Court of Appeals has left undecided and dispose of the case accordingly.

**B. Petitioners' prayers before Judge Woolsey may properly be considered also as equivalent to a motion for similar relief made in the receivership proceedings.**

As stated above, petitioners' bills were filed in the very court in which the receivership proceedings were pending. All persons in any way interested as parties

in the receivership proceeding appeared and were fully heard on the merits. Nothing different would have happened, had petitioners sought their relief in the receivership proceeding, except that their papers would have been entitled with different captions and except that the respondents might have requested that the motion be referred to Judge Manton pursuant to Rule 4 of district court rules.

That petitioners' papers were improperly entitled surely cannot be made the ground for refusal of their relief. Respondents cannot seriously contend that the determination of the important issues involved in this case should turn on the title of the papers. The regularity of the administration of so large a receivership cannot be left in a shroud of doubt for so frivolous a reason.

That petitioners' prayers were not referred to Judge Manton likewise cannot be made a ground for their denial. Judge Manton had already pre-judged the case. He had already signified that he regarded his orders as within his competence. To have gone before him would have been an entirely useless formality. Moreover, the propriety of his own conduct was in question. This was not the customary attempt to vacate a receivership on grounds which the appointing judge is qualified to decide. This was an attempt to vacate the judge's orders on the ground that his own conduct, deliberately chosen, was unauthorized and improper. On all principles of decency and propriety in judicial administration, Judge Manton would have been disqualified to hear petitioners' prayer and would doubtless have refused himself (compare judicial code Section 20, 28 U. S. C. A. Section 24).

Respondents were in no way prejudiced by petitioners' choice of remedy. In view of Judge Woolsey's order consolidating petitioners' bills with the receivership proceedings and quite apart from the effectiveness of that order, either to constitute a merger of the two causes or an order of intervention, the complete records in both

cases were before the District Court, the Circuit Court of Appeals and are in the record before this Court. Any possible contention that respondents could have made had petitioners' prayers been heard by Judge Manton, could have been and was made before Judge Woolsey and the Circuit Court of Appeals. Any possible information that could have been gleaned from the records had the petitioners' prayers been heard before Judge Manton, was before the District Court and the Circuit Court of Appeals and is in the record in this Court.

**C. Petitioners' choice of remedy was not erroneous. But were it otherwise, in view of the serious doubt concerning the validity of any other remedy, their choice should not preclude them from the relief prayed.**

We have just shown that petitioners have not chosen an unavailable remedy for securing their relief, even if their bills in the district court be regarded exclusively as an independent and separate suit. The Circuit Court of Appeals conceded that if the rules violated by Judge Manton's orders were mandatory, so as to render his acts entirely null for lack of jurisdiction, the challenge could be made in the manner pursued by the petitioners. Having held however that the rules were directory only the Court further held that the challenge could be made only in the receivership proceeding and not by the bills filed by the petitioners.

The Circuit Court of Appeals conceded further that unless petitioners "had no other recourse" their procedure "was the proper way" (Record, p. 1033). It held that petitioners did have other recourse by way of intervention in the receivership proceedings, motion to vacate, and appeal if necessary from the ruling thereon. And because of the supposed availability of the other remedy thus suggested the Court of Appeals held that petitioners

did not come within this previous concession that unless they had no other recourse their procedure was the proper way.

Neither the Court nor the array of counsel for respondents were able to cite a single case as an exact precedent for the procedure suggested by the Circuit Court of Appeals. The situation which confronted the petitioners when their choice had to be made was novel and without precedent. As against the possibility of a remedy by way of intervention, petitioners were confronted with Rule 37 of the Rules of Equity Practice providing that an intervention must be subordinate to and in recognition of the propriety of the main proceeding. Ample precedent warned them that an intervenor cannot seek the aid of a Court and at the same time attack its jurisdiction; that intervention to challenge the jurisdiction or inaugurate litigation defeating what already has been done in the original suit is not permissible; that where a stranger to a cause seeks to impeach the jurisdiction of the Court entertaining it his proper remedy is by an original bill in equity.

*Rule 37, Rules of Equity Practice;*
*United States* v. *California Canneries,* 279 U. S. 553;
*Union Trust Co.* v. *Jones,* 16 F. 2nd 236;
*Board of Drainage Commissioners* v. *Lafayette State Bank,* 27 F. 2nd 286;
*Hopkins* v. *Lancaster,* 254 Fed. 190, 193;
*State Trust Co.* v. *Kansas City P. & G. R. R.,* 120 Fed. 398, 407.

Petitioners were not parties to the Receivership proceeding. They were warned by precedent that the right to appear specially in an action without waiving jurisdiction, and objecting to the jurisdiction of the Court, is limited to those named as parties in a cause. They were

warned by precedent that the operation of Rule 37 of the Equity Rules might give to their intervention the effect of defeating the basis of their objection.

Moreover, petitioners had no authority on the basis of which to assume that they could prosecute an appeal from an adverse ruling on their motion, which was inevitable if it were to be heard by Judge Manton, to the Circuit Court of Appeals. The Court of Appeals suggests in its opinion that such an appeal could be prosecuted because Section 277 of United States Code, Title 28, permits appeals from interlocutory decrees appointing receivers. Petitioners however were not challenging the propriety of the appointment of receivers for the Interborough. They were willing to concede that a receivership for the Interborough would be proper. What they were objecting to was the appointment of the particular receivers by the particular judge. Conceding the necessity for a receivership they wished to have it conducted in the regular manner by a judge duly authorized to act in the premises in accordance with the applicable statutes and rules and by receivers not associated with, dominated by, or friendly to, the management and interests which controlled the corporation up to the appointment of receivers.

It is thus not at all clear that the petitioners would have been able to prosecute an appeal if they had intervened in the receivership proceedings and had been denied relief by Judge Manton. Since they were objecting to the manner in which the receivership was being conducted, the suitability of the receivers named and the authority of the appointing judge rather than to the necessity and propriety of a receivership, it is very doubtful whether their appeal would fall within a provision permitting appeals from orders appointing receivers.

After the Circuit Court of Appeals has spoken, and if its word is not denied by superior authority, it is of

course clear that the other remedy suggested by the Court is available. The petitioners should not be charged with the responsibility of prophets. The validity of their choice should not be determined with the knowledge of the novel practice which the Circuit Court of Appeals has fashioned in the opinion under review, but rather with the knowledge reasonably chargeable to the petitioners at the time that their choice had been made.

In view of the fact that the availability of the remedy suggested by the Circuit Court of Appeals was concededly enshrouded in doubt, and instinct with the hazard of defeating the entire basis for petitioners' claim to relief, the possible availability of that remedy, subsequently discovered by the Circuit Court of Appeals, should not be considered as *another* method of recourse which made the plaintiff's procedure the *improper* "way." In view of the doubt and the dangers pointed out, the petitioners' procedure should have been considered by the Court as an *available* remedy within its concession that "unless (the parties) have no other recourse, (theirs) was the proper way."

As ~~this Court~~ Justice Cardozo has said:

> "Equity, it is said, will not be over-nice in balancing the efficacy of one remedy against the efficacy of another when action will baffle and inaction may confirm the purpose of the wrongdoer. *Falk* v. *Hoffman*, 233 N. Y. 199, 203."
>
> *Rogers* v. *Guaranty Trust Co.*, 53 S. Ct. 295, 305, Cardozo, J.

## POINT III.

**On the merits of the case, Judge Manton's orders in the receivership proceeding were so improper and unauthorized as to entitle petitioners to relief on any of the theories stated above.**

**A. Judge Manton's order designating himself to hear the application for a receivership on the Brake Shoe Company bill was an improper exercise of his power under Section 22 of the U. S. Code seriously impairing the equal and impersonal administration of justice in the Southern District of New York to the particular detriment of the interests of petitioners in the receivership.**

The order designating Judge Manton to hear the receivership case was made pursuant to Section 22 of U. S. Code, Title 28 (Judicial Code, Section 18) providing that: "The Chief Justice of the United States, or the circuit justice of any judicial circuit, or the Senior Circuit Judge may, if the public interest requires, designate and appoint any circuit judge of a judicial circuit to hold a district court within such circuit."

Respondents and the Circuit Court of Appeals urge that the section confers administrative power upon the senior circuit Judge, the exercise of which cannot be open to question. They treat petitioners' attack upon this order as equivalent to a contention that an order of designation under Section 22 is *always* subject to challenge at any time and in any proceeding in which the order may be involved. And in view of such dire consequences, the Circuit Court of Appeals sagely remarks: "parties are not subject to the peril that everything decided may be upset, unless they can satisfy another Court that there was an adequate occasion for exercise (of the power conferred by Section 22). The

power can, indeed, be abused, (yet) the remedy may be worse than the evil" (Record, pp. 1032-33).

This treatment entirely misconstrues petitioners' contention and misses its true point. It may be conceded that the exercise of the power conferred upon the senior circuit Judge is ordinarily conclusive and may not be challenged at *any* time and in *any* proceeding where his order of designation may be involved. Petitioners contend only that where it clearly and fully appears that the senior circuit Judge has acted upon grounds unauthorized in the statute and has improperly designated himself to sit in a case for reasons which are perversive of the objects of the statute and the proper administration of judicial business, then a *timely* objection to his order of designation made at the *beginning* of the case in which he has designated himself to sit justifies the vacation of his order and the correction of the abuse. It bears repetition that this Court is not called upon to upset a final judgment on the ground that the order of designation was so unauthorized as to deprive the Judge of all jurisdiction for all purposes. The Court is asked only to find that the authority conferred upon the senior circuit Judge was so improperly exercised as to justify the prevention of a continued functioning thereunder in this case.

Section 22, which forms the basis of Judge Manton's order, does not stand by itself in the Judicial Code. It is preceded and followed by, and is *in pari materia* with, other sections which illuminate its meaning and object. Thus Section 17, entitled "disability of judge; accumulation of business, designation of another judge", specifically states the purpose intended to be subserved:

> "whenever any district judge by reason of any disability or necessary absence from his district or the accumulation or urgency of business is unable to perform speedily the work of his district, the senior circuit judge of that circuit * * * may, if in his

> judgment the public interest requires designate any district judge in the Circuit to act as district judge in such district."

Such seems obviously to be also the considerations constituting the measure of the public interest intended by Section 22. Contemporary interpretation of that section by senior Circuit Judge Lacombe, upon whose conduct counsel for respondents have strenuously relied for precedent, leaves no doubt but that those were the considerations compressed in the expression "public interest". Referring to the fact that when that section of the Judicial Code was enacted Circuit Judges had been engaged in *nisi prius* work which was not completed and which would have been needlessly disrupted had no provision been made for their completion; and referring further to the great burden thrown upon the District Judges by the cases transferred to them of all *nisi prius* work without any increase in their members, Judge Lacombe said:

> "It was suggested (in Congress) that in such cases (those being conducted at *nisi prius* by circuit judges who were transferred to the Circuit Court of Appeals) it would be better, involving less delay, if the circuit judge were allowed to finish his incomplete work, rather than to require the district judge to take up the unfinished cause and familiarize himself with its prior history. It was also suggested that, at least in this district (the southern district of New York), there would sometimes be occasions when the business of the Court, increased as it was by old circuit court work, part of which had been theretofore done by circuit judges, might be so great that the district judges could not promptly dispose of it, while at the same time some of the circuit judges might be able to spare time from the work of the Circuit Court of Appeals. *These suggestions apparently commended themselves to Congress,* for the bill was amended so as

to include the provision above quoted." (Italics ours.)

*Pennsylvania Steel Co.* v. *New York City Ry.*, 221 Fed. 440 (S. D., N. Y., 1915).

The legislative history of the section strongly confirms this view of its intent.

46 *Cong. Rec.* 83, 88-90, 302, 304, 809, 1452-54, 2144-55, 3998-4002;
*Frankfurter & Landis,* The Business of the Supreme Court 128-135.

Plainly the term "public interest" does not confer arbitrary power upon the senior Circuit Judge to be exercised at his whim or caprice. Public interest to be comprehended must have some definition. And here it could mean only administrative interest.

Compare

*Federal Trade Commission* v. *Klesner,* 280 U. S. 19.

Judge Manton has supplied us with an authentic statement of the considerations which in his opinion constituted public interest calling for his designation order. He states in his justificatory opinion (1 Fed. Supp. 820) that he acted upon the affidavit of Interborough counsel stating that public interest required that individuals rather than a trust company be appointed receivers of the Interborough system, and upon the fear that if the receivership were applied for in the regular course before the District Judge duly assigned to receive such applications,

"the District Court *might* ignore Mr. Quackenbush's (Interborough counsel's) affidavit * * * and appoint

a trust company receiver notwithstanding." (Our italics.)

Counsel for the Interborough and the Brake Shoe Company came before Judge Manton on August 25, one day before the bill applying for the appointment of a receiver was filed in the District Court. The affidavit referred to was executed on August 25. Counsel did not even attempt to present the same application and make the same representations as to the character of the receiver to be appointed to the District Court. Although the District Judge duly assigned to receive such applications was in his chambers and available therefor, counsel did not even attempt to consult him. Nor did Judge Manton consult the District Judge whose proper function was to receive bills for the appointment of receivers at that time.

It is said that the fear of the appointment of a trust company as a receiver was justification for the order of designation. And it is said that the proper District Judge was not consulted by counsel before the application was made to Judge Manton, or by Judge Manton after the application was presented to him, because of some previous case in which a trust company was appointed receiver.

But such explanations hardly explain. It is well known that the district court rule in the Southern District of New York requiring the appointment of a trust company as receiver applies only to cases in bankruptcy. It is common knowledge that there is no rule or practice in the District Court requiring the appointment of a trust company as receiver in equity cases. And it is common knowledge, that, quite to the contrary, individuals have been and are repeatedly appointed as equity receivers by the District Judges in the District.

It could hardly be contended that the District Judges are blind to the desirability of appointing individuals as receivers when the interests of the receivership so require.

It could hardly be assumed without inquiry that the District Judge duly assigned to administer this part of the Court's business would not have been influenced by the same considerations which were presented in the affidavit and of the alleged importuning before Judge Manton on August 25th. The slightest regard for regularity in the conduct of a receivership involving so great a public interest would have required at least that the parties present their petition in the proper manner to the duly authorized District Judge. It is inconceivable that a District Judge would not have recognized, even of his own motion, the same considerations requiring the appointment of individuals that were recognized by Judge Manton. Had the District Judge signified his intention not to be convinced by counsel's representation of the necessity for the appointment of individuals as receivers, there would have been ample time thereafter to go before Judge Manton and renew the petition before him.

In addition, the Brake Shoe Company's bill could readily have been filed in the District Court for the Eastern District of New York, located in Brooklyn, as conveniently to the counsel for respondents as is the Court in the Southern District. The Interborough's lines extend into the Eastern District. Certainly with the consent of the Interborough, the suit could have been there maintained. And in the Eastern District, there would have been no possible danger that a trust company might have been appointed, since in that District, trust companies are not appointed either in equity or in bankruptcy.

Obviously Judge Manton's order was not based on the "public interest" in the expeditious administration of the District Court's business; nor yet upon any doubt as to the qualification and competence of the properly assigned District Judge to administer this receivership ably and honestly. The utmost that can be said for his order is that he feared, justifiably or otherwise, that the District

Judge might exercise his discretion and make an order on the merits of the case as presented to him differently from what the Senior Circuit Judge conceived would be appropriate. Such cannot be the basis upon which the Senior Circuit Judge is authorized to make designations under the statute.

*Nisi prius* work is entrusted by the statute exclusively to the District Courts, administered primarily by District Judges. The Senior Circuit Judge is not personally a Court of Appeals. He is not personally charged with the responsibility, nor given the power, to review decisions of the District Judges in any litigation. Appellate jurisdiction from the District Court is vested in this Court, or in the Circuit Court of Appeals, where the Senior Circuit Judge has but one vote out of three. His sole powers of supervision over the District Court are administrative.

Section 22 does not give to the Senior Circuit Judge the power to supplant District Judges in specific cases and select from the business of the District Court individual cases in which to sit. The power conferred upon him by Section 22 is the general power to designate any Circuit Judge to hold a District Court. His power to make designations for specific cases is derived solely from Section 24 of the U. S. Code, Tit. 28 (Judicial Code, Section 20). And the power thus conferred is expressly limited by that section to cases in which it appears that the District Judge "is in any way concerned in interest * * * or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit at the trial" of the case involved—and then only the power may be exercised on the application of either party. Such, concededly, was not the case here. There is no intimation that the District Judge before whom the application for receivership should properly have been made was disqualified in any way mentioned in Section 24 or otherwise.

Respondents' counsel rely largely upon designations made by Senior Circuit Judges of other Circuits and by prior Senior Circuit Judges of the Second Circuit as practical constructions of the statute and as precedents for Judge Manton's order. The reliance is patently misplaced. It need hardly be answered that no previous error, by its own force, justifies its contention. More pertinently however, counsel cite only the fact that other Senior Circuit Judges have designated themselves to hold District Courts. No information is advanced as to the circumstances in which these orders were made, or as to the extent to which their authority was utilized by the holding of District Courts by Circuit Judges. For all that appears, the designations may have been of the general type, not intended to do more than make available the Senior Circuit Judge for District Court business when the duly authorized District Judges were unavailable for any of the reasons stated in Section 17. And for all that appears, the orders of designation may have remained on the records without being carried to execution by action thereunder on the part of the Senior Circuit Judges.

The only specific instances cited by counsel in which a Senior Circuit Judge has designated himself to sit in a particular case are instances differing widely from the situation presented in this case and coming directly within the purpose of the statute as heretofore detailed. Thus in *United States* v. *Gill*, 292 Fed. 136 and *McClintock* v. *United States*, 60 Fed. (2nd) 839, the Senior Circuit Judge made his designation because the District Judge was disqualified by his interest from hearing the case involved. And in *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 221 Fed. 440, Judge Lacombe designated himself to continue the administration of a receivership which he had commenced and was in the process of administering as a *nisi prius* judge when the Judicial Code elevated him to the Circuit Court of Appeals. And

finally in none of the instances cited by counsel does it appear, as it does in this case, that the District Judges had previously attempted seriously to circumvent the abuses of federal receiverships by the adoption of rules with respect to the sessions in which applications for receivers were to be made, and in none of those instances does it appear that there were the differences between the Senior Circuit Judge and the District Judges that exist in this case, and in none of them does it appear that the Senior Circuit Judge deliberately flouted a rule of the District Court either because of a feeling that the rule was not binding upon him or because of an opinion that he could validly circumvent it by the contortion involved in his second order to be presently discussed.

The consequences of an exercise of power as that of Judge Manton in the order under consideration, upon the administration of justice generally, and upon the interests of the petitioners in this case specifically, are not hard to fathom. It is not compatible with the public interest and the policy of our law, in the equal administration of law, that parties should be privileged to seek out a Judge whom they may regard as favorable to their point of view—especially in equity receiverships, nor can it be conducive of proper administration of justice or respect for the law that duly authorized District Judges should be under the constant threat that unless their discretion is to be exercised in accord with the wishes of the applicant for a receivership, the bill would be removed from his cognizance and presented to another Judge.

The economic importance and political sensitivity of the receivership of the Interborough System has already been mentioned. The necessity for the appointment of independent receivers above all suspicion of reproach cannot be overemphasized. The history of the Interborough Company in New York City should make even the blind see the innumerable possibilities for conflict

between the management of the company, its bankers and associates, and individual or independent stockholders, security owners, creditors, the City of New York, and the public interest generally. Yet one of the receivers appointed was a lawyer, a retired Judge who had passed the age limit prescribed by the New York State Constitution for its Judges, who was then sojourning in Europe and who up to or immediately prior to his appointment had been a member of the firm appointed as counsel for the receivers. These counsel were themselves closely associated with the traction interests in New York City and had a comparatively short time before acted as counsel for the Brooklyn-Manhattan Transit Co., whose Board of Directors interlocks with that of Interborough Rapid Transit Co., and have also acted as counsel for bankers interested in Interborough. Their appointment caused considerable unfavorable comment in the press. Shortly after the commencement of this action and the hearing before Judge Woolsey they resigned (Record, p. 229).

Mystery enshrouds the relation of the receiver Dowling to this firm of counsel. While the public criticism was directed not merely at the firm of counsel, but also at this receiver, he did not chose to follow the example set, but contented himself with an official explanation of the charged relationship. Despite the specific charge levelled against him by public opinion, as expressed in the public press, he was satisfied with making the equivocal answer that "prior to my appointment as temporary receiver of the Interborough Rapid Transit Company pursuant to order of Hon. Martin T. Manton entered August 26, 1932, I had severed my association with the law firm of Chadbourne, Stanchfield & Levy and had no further connection therewith" (Record, p. 498). Significantly he failed, however, to state *when* he severed the association.

Petitioners represent substantial stock and creditor interests in the Interborough and Manhattan receivership. They feel thus greatly aggrieved and their interests seriously prejudiced by the appointment of receivers whom they regard as friendly to and influenced by the management of Interborough whose conduct it will be their function critically to scrutinize.

So far as the Manhattan receiver, William Roberts, is concerned, petitioners believe that his appointment was particularly unwise. For ten years he had been president, director and counsel for Manhattan. Although the lease between Interborough and Manhattan contains stringent provisions for the upkeep ~~of~~ by Interborough ~~and~~ of Manhattan's elevated railway properties, structures, stations and rolling stock, all of which are in the possession of Interborough, it is notorious that the same have been allowed to become dilapidated and antiquated to Manhattan's serious detriment. As a result causes of action for many millions of dollars have accrued against Roberts and his co-directors of Manhattan. Since Robert's appointment as receiver, he and his co-directors have lost the confidence of Manhattan's stockholders and were ousted by them at the last annual meeting, because of the negligent discharge of their offices. Roberts, of course, can hardly be expected to vigorously prosecute an action against himself and his co-directors for his and their neglect of duty. Surely, one who for ten years has neglected his duties as president and director of Manhattan is hardly a wise choice to protect Manhattan as its receiver.

**B. Judge Manton's order resolving the factitious disagreement between himself and the eight District Judges on the distribution of the business of the District Court was an unauthorized and improper exercise of his power under Section 27, U. S. Code, Tit. 28 (Judicial Code, Sec. 23), tending to disrupt the morale of the administration of that Court, to promote confusion in its practice, conflict between its Judges and the senior Circuit Judge and opportunities for improper sparring by parties for a favorable Judge or favorable appointments of receivers, to the great detriment of the interests of these petitioners in the Interborough receivership.**

Before Judge Manton acted at all in the case at bar, the eight District Judges comprising the District Court for the Southern District of New York had pursuant to Section 27 of U. S. Code, Tit. 28, unanimously agreed upon the distribution among them of the Court's business for the current year. They had unanimously agreed upon and posted a schedule setting forth the sessions which each of them was holding during the period and the character of the business which each would then administer. In order to provide for the possibility of designations of Judges by the Chief Justice, Circuit Justice, or Senior Circuit Judge, the eight Judges had unanimously agreed upon and promulgated District Court Rule 1-a, reading as follows:

> "1-a. Any judge designated to sit in the District Court for the Southern District of New York, shall do such work only as may be assigned to him by the Senior District Judge."

In order to administer efficiently the business of the Court, prevent confusion in its practice, and avoid abuses in cases of equity receivership, the eight district Judges

had unanimously agreed upon and promulgated District Court Rule 11-a, reading as follows:

> "11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the bankruptcy rules), shall be made to the judge assigned to hold the bankruptcy and motion part of the business of the court and to no other judge."

Confronted with this situation, Judge Manton attempted to circumvent it by issuing an order reciting that as Circuit Judge designated to hold a District Court, he disagreed with the distribution of business thus provided by the District Judges; that as Senior Circuit Judge he resolved that disagreement in favor of himself as a Judge designated to hold a District Court. Pursuant to that order, he felt free to disregard not only the unanimous agreement of the District Judges on the distribution of business, but also the regularly promulgated Rules 1-a and 11-a above set forth. Respondents contend that this conduct was within the scope of the authority conferred upon the Senior Circuit Judge by Section 27 of U. S. Code, title 28. But they also emphatically contend that Rules 1-a and 11-a are invalid and not binding upon a designated Circuit Judge.

1. *Respondents' contention that Rules 1-a and 11-a are invalid is frivolous and unsubstantial.*

The contention that the promulgation of Rules 1-a and 11-a is not within the power of the District Court rests upon the quicksand of misinterpretation and distortion. No mystery surrounds the meaning of these rules. Their meaning and reasonableness is fully obvious. They are rules designed solely for the more efficient administration of the practice and business in the District Court and are fully within the competence of that Court's power to enact rules.

The authority of the District Court to enact rules for the regulation of practice before it and for the efficient administration of its business is not only inherent in that body as a Court, but is expressly recognized by statute and Equity Rules of this Court.

*Rose, Fed. Jurisdiction and Procedure,* page 47;
*28 U. S. Code,* Section 731;
*28 U. S. Code,* Section 27.

Section 27 reads as follows:

> "Section 27. (Judicial Code, Section 23.) Districts with more than one judge; division of business.—In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district. (March 3, 1911, c. 231, Sec. 23, 36 Stat. 1090.)"

If the words of the statute that the District Judges "may agree upon the division of business and assignment of cases for trial" means anything at all, it must mean at least that the District Judges may, as they did in the Southern District of New York, agree upon the sessions to be held, and the character of cases to be heard, by each of them. Likewise if the words of Section 731, *supra*, authorizing the District Courts to "regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings" are to have any meaning at all, they must mean at least that the District Court is empowered to enact administrative regulations of the character of Rules 1-a and 11-a.

Neither rule impairs the statutory jurisdiction of any Judge. No Judge sitting as per the schedule agreed

upon by the District Judges pursuant to Section 27 lacks the complete power to exercise all the jurisdiction conferred upon him by the Constitution and statute without impairment by either rule. The rules simply attempt to organize the personnel of the Court and prescribe where the Judges shall sit and where counsel shall go for the particular type of relief in which they are interested. The rules no more detract from the jurisdiction of the Senior Circuit Judge designated to hold District Court than from that of the District Judges regularly holding such Courts. The ~~condition~~ occasion by designation of an additional Judge to hold a District Court obviously requires some provision for the assignment of business to him. It cannot be expected that he should enter the Court, seek and select business to transact and disrupt the going work of the regular Judges. The provision made by Rule 1-a in contemplation of the designation of the Judge is an eminently reasonable and business-like way of meeting the situation.

Nor can Rules 1-a and 11-a possibly be in conflict with Section 13 of 28 U. S. Code* or other provisions conferring power upon Judges. No such provisions attempt to do more than confer power upon Judges which may be exercised when invoked in the usual and orderly manner. Nor do such provisions do more than confer a power upon the class of Judges dealt with rather than upon any specific Judge particularly situated. Rules 1-a and 11-a do not attempt to detract from this power.

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*28 U. S. C. A. 13.

The district courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing any pleading, or issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. Any district judge may, upon reasonable notice to the parties, make, direct and award at Chambers or in the Clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

They do not attempt to strip the District Court at any time of a Judge competent to exercise fully any jurisdiction conferred upon him by any provision of statute or Constitution. On the contrary, the rules have for their purpose the availability of a Judge at all times for the granting of any relief which parties may seek. Their plain function is to apprise parties definitely where to go at any particular time with their applications for relief. It certainly cannot be the purpose of Section 13 of 28 U. S. Code, or other provisions collected through the industry of respondents' counsel, to promote confusion and disorderly administration of justice where *any* Judge could always be called upon to hear *any* kind of application, and where parties could scurry around in search of a particular Judge who might favor their application.

Nor can Rule 11-a be attacked as an equity rule in conflict with Rule 79* of the equity rules promulgated by this Court because not concurred in by a majority of the Circuit Judges. In the first place, respondents have not shown that a majority of the Circuit Judges have not concurred in the rule. Rule 79 does not stipulate the means by which such concurrence is to be manifested. Concurrence by a majority of the Circuit Judges individually, verbally, or by tacit acquiescence may clearly be sufficient to meet the requirements of Rule 79. Respondents have shown only that Judge Manton alone, of the five Circuit Judges in the Second Circuit, has dissented from Rule 11-a. None of the other four judges has expressed a dissent and it is entirely consistent for all that appears that they have verbally or tacitly acquiesced and concurred in the promulgation of that rule.

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*Rule LXXIX—Additional Rules by District Court.

With the concurrence of a majority of the circuit judges for the circuit, the district courts may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same.

But more emphatically, it is nothing short of absurd to contend that Rule 11-a is an Equity Rule. Its sole and only function is, as Judge Woolsey has said below, to point out the room to which counsel must go with their prayers for the appointment of equity receivers. Nothing in the rule attempts to control or regulate the exercise of the judge's discretion in entertaining and granting or denying applications for receivers. Nothing in the rule attempts to point out or measure the considerations which a judge must take into account in disposing of an application for a receiver. No legal or equitable rule of law, no principle and no standard is in any way affected by Rule 11-a. It is entirely a calendar rule designed to promote efficiency in ordinary administration rather than to have any bearing whatsoever upon the merits of any controversy or the manner in which it is to be disposed of in view of its merits.

Quite as frivolous is the contention of respondents' counsel that Rules 1-a and 11-a are inconsistent with Rule 6 of the Equity Rules promulgated by this Court.* The plain purport of that rule is to require the establishment of regular times and places for the hearing of motions. But the requirement is safeguarded against the possibility of an interpretation as a prohibition against the decision of routine matters by the District Judge at other times. Moreover, the rule deals obviously with District Courts, and not the powers of particular judges. Its language is phrased so as to make clear its requirement that each District Court shall have regular motion days, but that at the same time each District Court shall not be barred from having some Judge available at other

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*Each district court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings, and proceedings for the advancement, conduct, and hearing of causes.

times and places for the determination of the matters mentioned. It clearly does not mean that in a District like the Southern District of New York, having eight Judges, each Judge shall be available to make the determinations mentioned. It is obviously sufficient if *a* District Judge is available for that purpose. All this quite apart from the consideration that the "interlocutory orders, rulings and proceedings for the advancement, conduct, and hearing of causes", may embrace matters other than the serious business of appointing receivers for going concerns.

The wisdom and reasonableness of Rules 1a and 11a is particularly apparent when considered in the light of the situation with reference to receiverships. Abuses in that field have variously been charged many times and in many places. The opportunities for abuse because of the serious nature of the relief sought, the speed with which the judicial process is invoked and becomes effective, and the temptation for the exercise of a power accompanied by great possibilities of patronage and advancement of selfish interest, are particularly great. Not so long ago abuses of this kind in bankruptcy matters had become a public scandal in the Southern District of New York. And the Judges of that Court have taken the drastic step of requiring that only a trust company be appointed a bankruptcy receiver. In equity cases the District Judges have not taken so drastic a step—influenced perhaps to some extent by the opinions similar to that of Judge Manton that some equity receiverships require, in the public interest, that individuals be appointed. But the Judges have attempted to limit the opportunities for abuse by the enactment of Rules 1-a and 11-a. They have attempted in that fashion to remove from parties the opportunity for canvassing eight or more Judges for the purpose of finding the one who will accord them the most favorable treatment. And they have required that only the particular Judge assigned for

the time being to the consideration of such causes should be approached for that relief. Surely, no public interest would be subserved by a removal of these precautions and a restoration to parties and Judges of the invidious opportunities for sparring that have previously existed.

2. *The contention that Rules 1-a and 11-a violated by Judge Manton, are invalid is not merely unsubstantial but is irrelevant and evasive of the issues involved in this case.*

Judge Manton's order resolving the conflict between himself and the District Judges was based on the assumption, obviously, that the Rules were valid. Otherwise, of course, his order would have been wholly unnecessary. But even if the rules were, contrary to the showing made above, deemed invalid, petitioners' case would be in no way weakened. It is not our contention simply that Judge Manton violated Rules 1-a and 11-a in appointing the Receivers. His orders are not to be adjudged as isolated, individual exercise of power. His orders must be construed in the light of the entire course of conduct which led to the appointment of the Receivers. We contend that this course of conduct in its entirety was so improper and irregular that this Court cannot permit the *continuance* of the receivership under such circumstances. The orders were in violation not only of Rules 1-a and 11-a which respondents challenge, they were in violation also of the schedule duly adopted and promulgated by the unanimous agreement of the eight District Judges for the distribution of the business of the Court pursuant to 28 U. S. C. A., Sec. 27. The power to make such distribution is not and cannot be challenged by the respondents. And it is our contention that Judge Manton's orders were not simply unauthorized because of the violation of Rules 1-a and 11-a, but that they were also highly improper and irregular because of the violation of the schedule for the distribution of

the business of the District Court. Coupled with the impropriety of the original order of assignment and the irregularities presently to be mentioned, this deliberate violation should justify this Court to prevent the *continuance* of this receivership under such auspices.

3. *The order purporting to resolve the factitious disagreement between Judge Manton and the District Judges was an unauthorized and abusive exercise of power under Section 27 U. S. Code, Title 28.*

It must be conceded, of course, that a Senior Circuit Judge has power under Section 27 to resolve a conflict between District Judges on the distribution of District Court business. And it may even be conceded, for the sake of argument, that a designated judge is a District Judge for the purposes of this section so as to entitle the Senior Circuit Judge to resolve a conflict between such a designated judge and the District Judges. But these concessions can in no way strengthen the validity or propriety of the order attacked.

For it must be patent that in this case there did not exist a disagreement which the Senior Circuit Judge was then called upon to resolve. Though in time the order of designation may have been signed before the resolving order, it is obvious that the order of designation and the resolving order were inseparable parts of one plan and course of conduct. By Judge Manton's own concession he disagreed with the distribution of business agreed upon by the District Judges before he designated himself to hold a District Court. His designation order contemplated and was partly intended to create the disagreement which he was then to resolve by his second order. Moreover, by Judge Manton's own concession he signed the two orders not because as designated judge he disagreed with the distribution agreed upon by the District Judges, but because he feared a certain kind of judicial determination by the District Court in a litigation about to be instituted. He, by his own concession,

entered into the situation for the purpose of avoiding that kind of determination. He did not make the designation and then find himself in disagreement, but, on the contrary, created the disagreement, designating himself for that purpose.

Moreover, when Section 27 speaks of disagreement which a Senior Circuit Judge is authorized to resolve, it must contemplate at least some consultation and inquiry for the purpose of ascertaining that disagreement exists, and perhaps the cause or basis of the disagreement, so as to enable him to make a proper order for the division of the Court's business. It is plain in the record of this case that Judge Manton made no attempt before signing the resolving order to inquire from the District Judges whether they were willing to have him sit in the case, or whether some other arrangement satisfactory to them all was possible. *Per contra,* it clearly appears that the designating and resolving orders were signed and filed on the same day and presumably at one and the same time without any attempt to reach an agreement.

Not only was the disagreement factitious, but it was clearly in violation of the policy, if not the letter, of Section 216 of 28 U. S. Code, for Judge Manton to act in the resolution of the conflict. That enactment prohibiting judges sitting in the Circuit Court of Appeals from sitting in review of determinations made by themselves below is founded on the old truth that one is not competent to sit as judge in his own cause, and, as counsel for himself, plead his cause before himself.

> *Moran* v. *Dillingham*, 174 U. S. 153;
> *Rexford* v. *Brunswick-Balke Co.*, 228 U. S. 339.

The lay view of Judge Manton's conduct in this respect, is reminiscent of Gilbert's and Sullivan's Chancellor, so widely repeated in the press.*

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*See the editorial comments in the "New York Tribune" of October 15th, 1932, and the "New York World-Telegram," September 21st, 1932

**C. The order appointing the main receivers for the Interborough and Manhattan was under all the circumstances a wholly improper exercise of discretion in violation of the protective restrictions enunciated by this Court, and repeated warnings against their violation.**

It is the traditional doctrine of equity courts that a receiver should not be appointed on the bill of an unsecured simple contract creditor. In the *Metropolitan Railway Receivership* case, 208 U. S. 90, this Court sanctioned a departure from the traditional doctrine under particular circumstances justifying the result, where the defendant corporation had consented to receivership and waived the objection to equity jurisdiction. Since that decision, this Court has several times attempted to shut the door to abuse thus left open. The Court has emphatically and repeatedly warned that its limited sanction of friendly receiverships contemplated only friendliness in the institution of suit by the complainant; that it does not embrace a collusive consent to a receivership for improper purposes; that it does not extend to the misrepresentation or concealment of any matters bearing upon the grounds or purposes of the receivership; and pre-eminently that it does not permit the appointment of receivers friendly to the old management or other special interests, or for any considerations of patronage or self-interest. At the present Term, this Court has said:

> "We have given warning more than once * * * that the remedy * * * is not to be granted loosely, but is to be watched with jealous eyes. * * * Never is such a remedy available when it is a mere weapon of coercion, a means for the frustration of the public policy of the state or the locality."
>
> *Shapiro* v. *Wilgus*, 287 U. S. 348.

And at the preceding Term, the Court said:

> "This court has had occasion to point out the abuses that can arise from friendly receiverships

forestalling the normal process of administration in bankruptcy and enabling a tottering business to continue while creditors are held at bay * * *. Receiverships for conservation have at times a legitimate function, but they are to be watched with jealous eyes, lest their function be perverted."

*Michigan* v. *Michigan Trust Co.*, 286 U. S. 334, 335.

In *Harkin* v. *Brundage*, 276 U. S. 36, the late Chief Justice Taft, speaking for a unanimous Court, incisively depicted the dangers against which Judge Manton should have guarded in his consideration of the Brake Shoe Company's bill. The language of the late Chief Justice, based on a large and understanding experience in this field, is particularly apt in connection with the Interborough receivership:

*"The desire of those who represent an embarrassed corporation to seek a refuge from active and urgent creditors, under the protecting arm of an officer of the Court, leads to strenuous efforts to frame a case which may under equity practice justify a receiver.* * * *

*"More than this, circumstances which should have no influence lead the parties in interest to prefer one court to another in the selection of the person to be appointed as receiver, with the hope on behalf of those in charge of the embarrassed corporation that the appointment may fall to one whose conduct will be in sympathy with, rather than antagonistic to, the previous management of the corporation, in the hands of which the embarrassment has arisen. As the Court of Appeals says, there should be no 'friendly' receiverships, because the receiver is an officer of the court and should be as free from 'friendliness' to a party as should the court itself.*

*"Nor should there be any competition or rivalry on the part of the two Courts themselves in regard to assuming jurisdiction. The temptation of the exercise of power and patronage in the selection of receivers and the management of great businesses*

*under the court should not be a featherweight in prompting court action."* (Italics ours.)

*276 U. S.*, 36, 55.

See:

*41 Yale Law Journal*, 1086;
*13 Cornell Law Quarterly*, 499, 526.

The bill filed by the Brake Shoe Company, and the consent of the Interborough to the appointment of receivers, was more than an attempt to secure a so-called friendly receivership within the sanction of the *Metropolitan Railway* receivership case. It is charged by petitioners that the real motive for the attempt to procure receivers, was concealed from the complainant's bill. That the Interborough could pay the complainant's debt and other current debts as they fell due seems entirely clear from the admitted fact that on the date of the filing of the bill the Interborough had close to $5,000,000 on hand in cash. The real purpose for the receivership proceeding, it is charged in petitioners' bills and can hardly be denied, was to rid the Interborough of the Manhattan lease—a result which the Interborough has for a long time desired. It is further charged by petitioners that to accomplish this purpose Interborough was prepared to destroy Manhattan through a foreclosure of its first mortgage and the wiping out of its stockholders and junior bondholders. The conduct of Interborough receivers in defaulting in the payment of Manhattan's first mortgage interest while, under the protection of the Court, they continued to operate its properties and collect its income lends substance to the charge and strongly corroborates petitioners' contentions. It stamps the receivership as being not merely collusive but fraudulent as well.

The Interborough not only procured a friendly creditor to institute the proceeding, but it sought out a particular judge instead of proceeding in the regular manner; and

made protestations as to the kind of receivers to be appointed. Its success was pleasingly enhanced when, on the petition of the Manhattan Company for an extension of the receivership to it, the President of the Company was appointed sole receiver—despite convincing charges that he was in close accord with the management of the Interborough whose violation of the Manhattan Company's rights and interests had been commonly known for years.

Law journals as well as the public press have commented adversely upon the result of the proceedings and the whole course of conduct leading thereto. See:

*42 Yale Law Journal,* 279;
*46 Harvard Law Review,* 503.

Doubt has been expressed, however, as to whether on technical, legalistic grounds the orders could be set aside in the manner sought by the petitioners below. But, as we have already shown, the doubt is entirely unjustified. The violation of statute and rule in the entry of the orders renders them fatally defective.

*Weil* v. *Neary,* 278 U. S. 160;
*In re Rodgers Pyatt Shellac Co.,* 43 Fed. (2d) 863, aff'd. 51 Fed. (2d) 988 (C. C. A. 2nd Circuit);
*Case* v. *United States,* 14 Fed. (2d) 510;
*Scranton Button Co.* v. *Neonlite Corp.,* 105 N. J. E. 708.

Whatever might have been the fate of the orders had they not been challenged until the completion of the receivership, or in a collateral attack, or after the receivership had proceeded to such a state that the harm could not be undone, there can be no doubt that in this proceeding with the attack made directly, at the very beginning

of the receivership and before anything had been done which cannot be saved without causing hardship, the orders may be set aside and propriety in the administration of the Federal Court in the Southern District of New York be restored.

## POINT IV.

**The grant of petitioners' prayers for relief and the reversal of the decree of the Circuit Court of Appeals need not result in the complete undoing of all that has been done under the receivership if the Court believe that such a result would be unduly harsh.**

Counsel for some of the protective committees who intervened in the receivership proceeding, have pathetically appealed for the innocent security-holders whose interest might be irreparably injured by the vacation of Judge Manton's orders. It is characteristic of this plea that the protective committees thus represented are composed primarily of the bankers who dominated the affairs of the company before the receivership.

But such dire consequences, if indeed they would be dire, can readily be avoided by conditions which this Court, in the exercise of sound discretion, may impose upon its reversal of the decree below. The reversal may be accompanied with a provision granting permission for an application to be made to a proper judge for the appointment of new receivers, and the reversal may be accompanied further by a condition that all proper acts of the receivership, which it would be unjust to undo, be validated. To such conditions, petitioners cannot and do not object.

For the reasons indicated above, the petitioners submit that this case calls for an exercise of this Court's supervisory power over the lower Federal Courts, and they

pray that the decree of the Circuit Court of Appeals be reversed.

Respectfully submitted,

LOUIS BOEHM,
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FILE COPY

No. 711.

MAY
CHARLES EL

# Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. 711 and 721.

BENJAMIN F. JOHNSON,

*Petitioner,*

*vs.*

MANHATTAN RAILWAY COMPANY, *et al.*

LILLIAN BOEHM,

*Petitioner,*

*vs.*

MANHATTAN RAILWAY COMPANY, *et al.*

*On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.*

## MEMORANDUM IN REPLY TO TWO PAMPHLETS ENTITLED "LIST OF 84 OPINIONS", ETC., AND "COPIES OF COMMUNICATIONS FROM THE SENIOR CIRCUIT JUDGES", SUBMITTED BY COUNSEL FOR RECEIVERS OF INTERBOROUGH RAPID TRANSIT COMPANY.

CHARLES FRANKLIN,
ALFRED C. B. McNEVIN,
HERBERT GOLDMARK,
LEONARD H. GOLDENSON,
*Counsel for Petitioner Benjamin F. Johnson.*

THE COURT PRESS, INC., Law Printers, 130 Cedar St., N. Y. C.

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Not one of the 84 opinions cited in the memorandum of counsel for the Receivers of the Interborough Company can be said to cover nor approach the situation created by Judge Manton's designation of himself in the instant case; and this is also true of the communications sent by Senior Circuit Judges from other circuits. *Nor does it appear that*

---

* Filed by leave of Honorable Willis Van Deventer, Associate Justice of the Supreme Court of the United States. Granted May 1, 1933.

*the practice was ever opposed.* The questions presented go beyond the practice of self-designation, or the borders of the southern district of New York. In the case before the Court the designation has caused discord, where there should be concord and that mutual understanding which engenders and promotes the better administration of justice in our federal courts.

I.

On examination of the eighty-four opinions written by Senior Circuit Judges, while sitting in the district court, it will be found that no statement appears in said opinions giving the circumstances under which said Senior Circuit Judges designated themselves to sit in the district courts wherein they rendered the opinions. It will be observed that twenty-one of the eighty-four opinions were written by Senior Circuit Judge Lacombe of the Second Circuit in the case of *Pennsylvania Steel Co.* v. *New York City Railway Company*, 221 Fed. 440, cited in our brief at page 26.

Judge Lacombe said in that case that, if an objection had been made promptly as to the propriety of his order designating himself to hear that particular case, he would have presented a statement of the situation to the Chief Justice of the United States or a Circuit Judge. Besides, in that case, Judge Lacombe says he entertained jurisdiction over the cause while he was Circuit Judge before the circuit courts were abolished; and hence he found it to be in the public interest, to continue with the cause after he became a member of the Circuit Court of Appeals. It was for that purpose only that he designated himself as district judge to complete the judicial work he had begun. Judge Lacombe points out that congestion of the district court, or an unfinished case partially heard by a Circuit Judge prior to abolition of the Circuit Courts, might justify such designation.

As to the balance of the sixty-three reported cases, listed in said pamphlet, it does not appear what reasons existed for the designation of themselves by the Senior Circuit Judge who wrote the opinions. It is difficult to see, in the absence of a statement of the reasons which prompted the designation, how counsel can reach the conclusion that a Senior Circuit Judge may designate himself a district judge, for reasons other than those mentioned in Sections 13 to 17, inclusive, of the Judicial Code.

## II.

An examination of the other pamphlet, which contains communications from Senior Circuit Judges designated to hold district courts, will show that where such communications give any reason by the Senior Circuit Judges for designating themselves, respectively, to sit in the district courts, such reason is one of those set forth in Sections 13 to 17, inclusive, of the Judicial Code, permitting such designation.

In the other communications no reason is given by the Senior Circuit Judges for the designation, and we have the right to assume, therefore, that in such cases the same conditions precedent referred to in said sections existed.

The telegram of Senior Circuit Judge Bingham of the First Circuit does not say under what circumstances he made such appointment, that is, whether it was on account of death, absence, or disability of the district judges to act, or because of an exceptional accumulation of the business of the Court, which the duly appointed district judge was not able to handle expeditiously.

On the other hand, Senior Circuit Judge Buffington of the Third Circuit states that, "in cases where there has been no district judge to act and the public interest required, I have, on occasion, designated myself to sit in a

district court." In other words, Judge Buffington appointed himself to sit in the district court only where there was no district judge who was in position to act, and the public interest made such designation necessary.

In this case, no such situation existed, inasmuch as District Judge Patterson was sitting in the Motion Part of the Court to which he had been assigned in accordance with effective court rules, and was ready to hear the application for the appointment of receivers herein, had such application been made to him. None of the reasons assigned in any of the messages were present in the case at bar.

The letter of Senior Circuit Judge Parker of the Fourth Circuit shows that he designated himself only once to sit as a district judge, and that was when the regularly appointed district judge was in the midst of an important trial at Asheville, N. C., when his Shelby Term was scheduled to open. Judge Parker therefore designated himself district judge for the Western District of North Carolina and proceeded to Shelby and opened the court. Here no emergency required Senior Circuit Judge Manton to designate himself district judge to appoint receivers in the *Brake Shoe* case.

All the other designations in the Fourth Circuit were made by Senior Circuit Judge Waddill of himself, but the list thereof set forth at pages 7 and 8 of the pamphlet do not show the reason for the designations. It may have been that the regular district judge was ill, under a disability or unable on account of other business to hear the cases for which Judge Waddill designated himself.

The telegram of Judge Moorman at page 9 of the pamphlet states specifically that the two designations therein referred to were made only because the judge of the district court was disqualified.

While Judge Altschuler states in his telegram that it has been the custom of the Senior Circuit Judge to

assign himself to the district court, we are justified in the absence of an allegation to the contrary, in assuming that such designations were made for one of the reasons set forth in Sections 13 to 17, inclusive, of the Judicial Code, and not for an arbitrary reason, as in the case at bar.

Judge Kimbrough Stone of the Eighth Circuit merely says that it was the custom of Judge Sanborn, and his own, to assign themselves respectively to the district court, "whenever necessary", but he does not specify what such necessity was.

Judge Wilbur wired, that it was not the practice of his predecessor Judge Gilbert to assign himself to the district court, and that he himself had done it only once "where the district judge was absent, and an extension of time was necessary to preserve the rights of the parties".

In the Tenth Circuit, Senior Circuit Judge Lewis assigned himself only once to the district court, but his telegram does not say under what circumstances the designation was made.

We respectfully submit that, in none of the opinions cited, was the designation fraught with the danger of disrupting the business of the district courts, by improperly fusing the functions and respective spheres of activity of the appellate and district courts which it was contemplated on abolition of the circuits courts would be kept separate and distinct.

Dated, May 3rd, 1933.

CHARLES FRANKLIN,
ALFRED C. B. McNEVIN,
HERBERT GOLDMARK,
LEONARD H. GOLDENSON,
*Counsel for Petitioner Benjamin F. Johnson.*

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 711 and No. 721.

BENJAMIN F. JOHNSON,
Petitioner,
*against*
MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,
*against*
INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER
*of the*
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

## MEMORANDUM OF PETITIONER, LILLIAN BOEHM, IN REPLY TO

## (A) COPIES OF COMMUNICATIONS FROM THE SENIOR CIRCUIT JUDGES IN ANSWER TO INQUIRY OF JUDGE MANTON,

## (B) LIST OF 84 REPORTED OPINIONS WRITTEN IN CASES HEARD BY SENIOR CIRCUIT JUDGES HOLDING A DISTRICT COURT,

## SUBMITTED BY COUNSEL FOR RECEIVERS OF INTERBOROUGH RAPID TRANSIT COMPANY.

These "Copies of Communications" and "List of 84 Opinions" submitted by counsel for the Interborough Re-

ceivers in a belated effort to support Judge Manton's self-designation to hold a District Court, and his consequent assumption of jurisdiction of the Brake Shoe cause, utterly fail in their purpose.

Analysis of these telegrams and lists establishes, on the contrary, that where Senior Circuit Judges have, in the past, designated themselves to hold a District Court, these designations have been prompted by, and confined to instances of, necessity for assignment because of absence, disability, or disqualification of the regularly sitting District Judge, or the necessity of disposing of an accumulation of business. No instance is shown of a self-designation by a Senior Circuit Judge prompted by the importance of any particular district court business which he deemed to be beyond the ability, experience or judgment of the regularly sitting District Judge, and to necessitate his personal judicial attention. Where self-designations are shown, it does not appear that they met with opposition, or that any rules of the district court existed, similar to those now under review.

## I.

Judge Bingham's telegram in answer to Judge Manton's inquiry apparently discloses a practice of self-designation in the First Circuit (Copies of Communications, p. 4). It throws no light however on the circumstances under which such designations are made. Whether Judge Manton's inquiry included the circumstances prompting such designations, we cannot say, for counsel, while publishing the answers to the inquiry, have not seen fit to publish the inquiry itself, obtainable no doubt from the same source. To clarify this answer, we addressed the following telegram to Judge Bingham:

"MAY 2, 1933.

HON. GEORGE H. BINGHAM,
SENIOR UNITED STATES CIRCUIT JUDGE
MANCHESTER, N. H.

AM COUNSEL FOR APPELLANTS IN INTERBOROUGH RAPID TRANSIT RECEIVERSHIP CASE IN UNITED STATES SUPREME COURT. YOUR TELEGRAM OCTOBER 15, 1932 TO JUDGE MANTON HAS BEEN SUBMITTED TO SUPREME COURT. WE HAVE BEEN GIVEN UNTIL FRIDAY TO PRESENT ANY MATTER IN REPLY. WILL YOU KINDLY WIRE ME COLLECT WHETHER YOU HAVE EVER DESIGNATED YOURSELF TO HOLD DISTRICT COURT:

(1) IN VIOLATION OF RULES OF DISTRICT COURT;

(2) OTHER THAN TO TAKE THE PLACE OF ABSENT OR DISQUALIFIED JUDGE OR TO DISPOSE OF ACCUMULATED BUSINESS.

YOUR ANSWER WILL BE SUBMITTED TO SUPREME COURT.

LOUIS BOEHM
30 BROAD STREET
NEW YORK CITY."

and received this reply:

"BU285 78 DL COLLECT-MANCHESTER NHAMP
2 139P

1933 MAY 2 PM 1 57

LOUIS BOHEN—
30 BROAD ST. NYK—

TELEGRAM RECEIVED IT HAS BEEN THE CUSTOM IN THIS CIRCUIT FOR THE PAST TWENTY YEARS OR MORE FOR THE SENIOR CIRCUIT JUDGE BEFORE THE OPENING OF A GIVEN TIME OF COURT IN THE MASS DISTRICT TO DESIGNATE ALL THE DISTRICT JUDGES IN THE CIRCUIT OUTSIDE THAT DISTRICT AND ALL THE CIRCUIT JUDGES COMMA INCLUDING HIMSELF COMMA TO SIT

IN THE MASS DISTRICT AT SUCH TERM PERIOD *THIS HAS BEEN DONE TO FACILITATE THE BUSINESS IN THAT DISTRICT*—

GEORGE H. BINGHAM."

(Our Italics)

It thus affirmatively appears that the motivating purpose of the self-designations in the First Circuit has been to dispose of accumulation of business in the busy Massachusetts District.

It appears from Judge Buffington's response to Judge Manton's inquiry that self-designations in the Third Circuit have been limited to instances of absence of the District Judge (p. 4).

Judge Parker, speaking for the Fourth District, had occasion to designate himself but once and this was necessitated by the enforced absence of the District Judge to open a scheduled term of court (p. 6).

The only two instances of self-designation in the Sixth Circuit reported by Judge Moorman arose from disqualification of the regular District Judge (p. 9).

Judge Alschuler's response indicates that it has been the practice in the Seventh Circuit for the Senior Circuit Judge to designate himself and his colleagues for each term of the District Court for Chicago, the busiest district and the largest metropolitan center in the Circuit. Obviously, these designations are made to facilitate the disposition of accumulated business in the busy Chicago District (p. 9).

In answer to our telegraphic inquiry to Judge Alschuler similar to that sent to Judge Bingham, above quoted, we received the following reply:

"CA1022 98 NL COLLECT—GN CHICAGO ILL 3
1933 MAY 3 PM 9 10

LOUIS BOEHM—
30 BROAD ST NYC—

I KNOW OF NO RULES OF DISTRICT COURTS OF THIS CIRCUIT ON THE SUBJECT OF ASSIGNMENT OF JUDGES TO SIT IN THOSE COURTS AM INFORMED THERE ARE NO SUCH RULES THEREON IN THE CHICAGO DISTRICT CAN ONLY SAY AS STATED IN TELEGRAM TO JUDGE MANTON THAT FOR MANY YEARS IT HAS BEEN CUSTOMARY HERE TO DESIGNATE CIRCUIT JUDGES INCLUDING SENIOR JUDGE TO THE CHICAGO DISTRICT COURT AT THE BEGINNING OF EACH TERM THEREOF *FOR THE CONVENIENCE OF THAT COURT AND THE PUBLIC* SO FAR AS I KNOW NO QUESTION ON THAT SUBJECT HAS EVER BEEN RAISED HERE—

SAMUEL ALSCHULER."

(Italics ours.)

While it appears from Judge Kimbrough Stone's answer to Judge Manton's telegram (p. 10) that self-designations had been made in the Eighth Circuit, it was silent as to the circumstances prompting the designations. Our telegram to Judge Stone, similar to that above quoted, brought the following reply, indicating a practice of avoiding self-designation when at all possible:

"CZ430 43 COLLECT— DX STPAUL MINN 2 211P
1933 MAY 2 PM 3 24 .0

LOUIS BOEHM—
30 BROAD ST CD NYK—

YOUR WIRE RECEIVED THERE ARE NO RULES IN ANY DISTRICT COURT IN THIS CIRCUIT WHICH COULD AFFECT ASSIGNMENT OF JUDGE TO A DISTRICT MY OWN WORK IS SO HEAVY THAT I AVOID ALL DIS-

TRICT WORK WHERE POSSIBLE TO SEND SOME OTHER JUDGE—

KIMBROUGH STONE SENIOR US CIRCUIT JUDGE."

Judge Wilbur, in the Ninth Circuit, reported to Judge Manton that self-designation was not the practice of his predecessor and that he himself had made a self-designation in only two instances, one of disqualification; and the other of absence of the district judge (p. 10). In response to our telegraphic inquiry, similar to that above quoted, he replied:

"GXB14 2 COLLECT— CO. SANFRANCISCO CALIF 2 1010A

1933 May 2 PM 1 20

LOUIS BOEHM
30 BROAD ST NYK—

NO—
CURTIS D. WILBUR"

The circumstances supporting the single instance of self-designation reported in the Tenth Circuit do not appear (p. 11).

It remains to note that we sent similar inquiries by telegraph to the Senior Circuit Judges of all the Circuits other than the Second Circuit, but that no response has been received other than herein set forth. Copies of our communications and the original replies are submitted herewith for the information of this Court.

II.

Considering now the list of 84 opinions reported, written by Senior Circuit Judges holding a District Court, which counsel have industriously compiled, it can of itself have no meaning without an accompanying showing of the circumstances under which the designation in

each case was made. It is unfortunate that counsel's industry was not applied to this essential inquiry. For all that appears, the self-designations evidenced by these opinions were all prompted by absence, disability, or disqualification of the regular District Judge or the necessity of disposing of accumulated business, within the Judicial Code, Secs. 13-17, incl.

We have in the very limited time for reply available to us, endeavored to supply this deficiency. Our examination of these 84 opinions, discloses that:

Twenty-one (21) opinions were written by Judge Lacombe in the single case of *Pennsylvania Steel Co., et al.* v. *N. Y. City Ry. Co.,* in which Judge Lacombe designated himself to sit to continue the administration of an equity receivership which he had commenced and was administering as a *nisi prius* judge in the old Circuit Court, when the Judicial Code abolished the court and elevated him to the Circuit Court of Appeals (221 Fed. 440).

Six (6) opinions pertain to cases which were similarly pending in the old Circuit Court before the Senior Circuit Judge, then *nisi prius* judge, was elevated, the designations being made to enable him to complete his unfinished business, viz:

*Weed Chain Grip Case,* 194 Fed. 448, a patent case, heard by Lacombe, S. C. J., in March 1912. It appears from the opinion that he had had this case before him previously, when the old Circuit Court ceased to function on Dec. 31, 1911.

*National El. Sig. Co.* case, 194 Fed. 893, a patent case, heard by Lacombe, S. C. J. on March 18, 1912. He had previously heard this case as *nisi prius* Judge in the old Circuit Court on December 5, 1911 and had granted a preliminary injunction (193 Fed. 424).

*Brown* v. *Sharp Mfg. Co.* case, 195 Fed. 84, a patent case, final hearing before Colt, S. C. J., March

21, 1912. The opinion indicates that the bill was filed in June 1907. It may reasonably be inferred that Judge Coldt had this case before him in the old Circuit Court and after his elevation to the new Circuit Court of Appeals, designated himself to hold a District Court to complete this unfinished business.

*Carpenter* v. *Knollwood Cemetery* case, (2 opinions) by Colt, S. C. J., 195 Fed. 84, Feb. 16, 1912, and 198 Fed. 297, July 7, 1912. Motions in an injunction suit which Judge Colt had heard as *nisi prius* Judge in the old Circuit Court and in which he had granted an injunction on June 1911 (see 188 Fed. 856).

*In re Steiner,* 195 Fed. 299, Lacombe, S. C. J., Feb. 1912. Contempt proceedings. The opinion shows that the contempt was committed in the old Circuit Court and the proceedings there begun prior to December 1911 when the court was abolished.

Fifteen (15) opinions, out of a total of 16, cited in the First Circuit, relate to matters heard by the Senior Circuit Judge in the busy Massachusetts District and are readily explained by Judge Bingham's telegraphic reply to our inquiry, above quoted, as prompted by the accumulation of business in that district.

Three (3) opinions by Sanborn, S. C. J., 8th C. (246 Fed. 260, 288 Fed. 612, 28 Fed. (2nd) 174), relate to the North American Co. case, an equity receivership conducted by Judge Sanborn for several years. The basis for the original designation is not evident from the opinions.

Thirty-nine (39), the remainder of the opinions cited, do not disclose by their content, the circumstances of the self-designation. From the telegraphic responses to Judge Manton's inquiry and our own, it is a fair inference that these cases reflected self-

designations caused by the accumulation of business, or the absence, disability or disqualification of the District Judge, and were not dictated by any belief on the Senior Circuit Judge's part that the particular case was of such importance as to require his personal judicial attention, or that he was more competent and able, or the regular district judge not sufficiently competent, able and experienced, to handle the particular judicial matter.

It is worthy of note also that of these remaining 39 opinions, 24 were written by Judge Lacombe, sitting in the busy Southern District of New York in the period from January 1912 (when the old Circuit Court ceased to function), to February 1916, when he resigned. The District Court, Southern District of New York, then had but four district judges to transact the current business of the largest metropolitan center in the country, as well as the unfinished business of the old Circuit Court, and the frequent designations of Judge Lacombe are explainable as prompted by the desire to complete his own unfinished Circuit Court business, as well as to assist in the disposition of accumulated business in the District Court during those years. Since his resignation in February 1916, only three opinions instancing designations are cited.

Respectfully submitted,

LOUIS BOEHM,
*Counsel for Petitioner, Lillian Boehm.*

IN THE

# Supreme Court of the United States

MAR 11

CHARLES ELMO

No. 711 and No. 712.

BENJAMIN F. JOHNSON,
*Petitioner,*
*against*
MANHATTAN RAILWAY COMPANY *et al.*,
*Respondents.*

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
*Respondent,*
*against*
INTERBOROUGH RAPID TRANSIT COMPANY,
*Respondent.*

IN THE MATTER
*of the*
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF:

VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., RECEIVERS OF INTERBOROUGH RAPID TRANSIT COMPANY.

WILLIAM ROBERTS, RECEIVER OF MANHATTAN RAILWAY COMPANY.

CHARLES HAYDEN AND OTHERS AS A COMMITTEE FOR THE PROTECTION OF THE HOLDERS OF THE TEN-YEAR SIX PER CENT. GOLD NOTES OF INTERBOROUGH RAPID TRANSIT COMPANY.

VAN S. MERLE-SMITH AND OTHERS AS THE PROTECTIVE COMMITTEE FOR MANHATTAN RAILWAY COMPANY CONSOLIDATED MORTGAGE 4% BONDS.


NATHAN L. MILLER,
*Counsel for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of the Interborough Rapid Transit Company.*

NATHAN L. MILLER,
WILLIAM W. MILLER,
CHARLES A. BOSTON,
CARL M. OWEN,
*of Counsel.*

CHARLES E. HUGHES, JR.,
ALLEN S. HUBBARD,
*Counsel for William Roberts, Receiver of the Manhattan Railway Company.*

CLOYD LAPORTE,
*Counsel for Charles Hayden and others as a Committee for the Protection of the Holders of the Ten-Year Six Per Cent. Gold Notes of Interborough Rapid Transit Company.*

PAXTON BLAIR,
*Counsel for Van S. Merle-Smith, as the Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Bonds.*

BOYKIN C. WRIGHT,
*Counsel.*

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IN THE

# Supreme Court of the United States

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---

The petition of Benjamin F. Johnson for a writ of certiorari was served on counsel for the Interborough Receivers

on February 20, 1933. On February 27, 1933, a brief in support of the petition of Johnson (entitled, however, "*Petition* and Brief") was served on counsel for the Receivers by the intervenor Lillian Boehm. This brief is presented in opposition to both the Johnson petition and the Boehm petition.

## Statement of Facts.

On August 26, 1932, on the bill of complaint of The American Brake Shoe and Foundry Company (R. 153) and the answer of the Interborough Rapid Transit Company (R. 171), Honorable Martin T. Manton, Senior Circuit Judge of the United States Circuit Court of Appeals for the Second Circuit, holding a District Court of the United States pursuant to designation, appointed Victor J. Dowling and Thomas E. Murray, Jr., temporary Receivers of the Interborough Rapid Transit Company (R. 180).

The order of appointment directed that the parties to the proceeding show cause on the 22nd day of September, 1932, "why the said receivership should not be continued during the pendency of this suit *and upon the hearing thereon any other creditor of the defendant or other party in interest may be heard*" (R. 184).

On September 6, 1932, the Manhattan Railway Company intervened in the proceeding and on its petition (R. 248) William Roberts was appointed a temporary Receiver of the Manhattan Railway Company (R. 196). The order for his appointment also provided that cause should be shown on the 22nd day of September, 1932, as to why that receivership should not be made permanent (R. 200).

Between August 26, 1932, and September 22, 1932, there were numerous interventions in the *Brake Shoe* suit by committees of security holders and an intervention by the Trustee of the First (Consolidated) Mortgage of the Manhattan Railway Company (R. 2, 3).

On September 28, 1932, no objection having been made thereto, the receivership of the Interborough and the receivership of the Manhattan were made permanent *pendente lite* (R. 223). On that day, The Guaranty Trust Company of

New York, as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company securing bonds then outstanding in the hands of the public in a principal amount in excess of $132,000,000, was made a party defendant (R. 226).

The petitioner Johnson did not choose to avail himself of the opportunity given by the order of August 26, 1932, to come in on September 22, 1932, in the *Brake Shoe* suit and contest the appointment of the Receivers. Instead, on September 21, 1932, he filed his bill of complaint in the United States District Court against the Manhattan Railway Company, the Interborough and their respective receivers (R. 7, 13). Solely as a stockholder of the Manhattan Railway Company (which had already intervened in the *Brake Shoe* suit) (R. 196), Johnson asserted the right to sue in behalf of that company, the interest of that company in the Interborough situation being that the Interborough was a lessee of all of the property of the Manhattan and was at the time in default in the payment of certain taxes on the Manhattan property, that being one of the items of rent under the lease. As such stockholder of the Manhattan Railway Company, Johnson attacked the validity of the appointment of temporary Receivers of the Interborough and of Manhattan made by Judge Manton, and asked, *inter alia*, for the appointment of other receivers (R. 43).

The bill of complaint in the *Brake Shoe* suit and the answer therein disclosed that the Interborough was in default in a substantial manner under its obligations under its aforesaid First and Refunding Mortgage securing bonds outstanding in the hands of the public in the principal amount of more than $132,000,000, and securing additional bonds in excess of $54,000,000 pledged as security for its Collateral Notes, that it was in default to a substantial degree under the terms of its lease of the elevated railroad of the Manhattan Railway Company, that it was badly in arrears in payment of taxes on its own property, that it had due and owing (or would have due and owing within a few days from the date of the appointment of the Receivers) indebtedness, *which it was*

*absolutely unable to pay,* for supply bills, rent under the Manhattan lease, principal and interest of funded indebtedness and past due taxes in an amount in excess of $48,000,000 (R. 164, 165).

As was stated by Judge Learned Hand for the Circuit Court of Appeals in the opinion below (R. 1028):

> "The controversy does not touch the substantial relief asked by any of the parties; all acknowledge that the two railways are in such financial straits that a court of equity must take over their assets, to prevent their dismemberment by execution, attachment and the like. *The plaintiffs (referring to Johnson and Bochm), and those who have intervened, ask for receivers, just as do the parties to the American Brake Shoe Company suit.* The dispute touches merely who shall be the receivers, and who the judge to have charge of the receivership. The question at the outset is whether the rules deprive the Circuit Judge of jurisdiction to proceed under the order designating him to hold the District Court." (Italics ours.)

In making the appointment of temporary Receivers and subsequently, on September 28, 1932, making their appointment permanent, Judge Manton acted pursuant to a designation to hold a District Court of the United States for the Southern District of New York, dated August 25, 1932 (R. 177). At that time there was also an outstanding effective designation of Judge Manton to hold a District Court for the Southern District of New York, dated March 20, 1930 (R. 661, fol. 1983).

On October 13, 1932, Judge Woolsey, in the *Johnson* suit, held that by reason of Rules 1-a* and 11-a** adopted on

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* Rule 1-a reads as follows:

"1-a. Any judge designated to sit in the District Court for the Southern District of New York, shall do such work only as may be assigned to him by the senior district judge."

** Rule 11-a reads as follows:

"11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy Rules) shall be made to the judge assigned to hold the Bankruptcy and Motion Part of the business of the court and to no other judge."

June 30, 1932, by the eight regularly appointed District Judges of the United States District Court for the Southern District of New York (but without the concurrence therein of the then sitting designated Judges; and of a majority of the Judges of the Circuit Court of Appeals as required by Federal Equity Rule No. 79 [R. 713, fol. 2139]), Judge Manton was entirely without jurisdiction to appoint Receivers, and that his appointment and all orders made by him in the *Brake Shoe* suit were absolutely null and void (R. 694).

On October 18, 1932, Judge Woolsey, solely on his own motion, and for the sole purpose of providing an alleged legal basis for entering an order in another suit (the *Brake Shoe* suit) over which he had no jurisdiction, entered an order consolidating the *Johnson* suit and the *Brake Shoe* suit into one suit under the title of "In the Matter of the Interborough-Manhattan Receivership Proceedings," and having made and filed said order of consolidation, he then entered an order in the said consolidated proceeding vacating all of the orders made by Judge Manton in the *Brake Shoe* suit. Judge Woolsey stated as his reason for consolidating the two cases (R. 710, fol. 2130):

> "There is in my mind a residuum of doubt whether, so long as they remain separate causes, an order could properly be made in the *Johnson* case, Equity No. 71-153, which would affect the receivership orders and the other orders made in the *American Brake Shoe & Foundry Company* case, Equity No. 70-364."

The Circuit Court of Appeals held that the order of consolidation was erroneous and reversed the same (R. 1034).

Neither Johnson nor Boehm in their petitions for a writ of certiorari raise any question as to the propriety of the decision of the Circuit Court of Appeals on this point. Accordingly, with the Order of Consolidation admittedly erroneous and out of the way, petitioner Johnson has no status whatsoever in the *Brake Shoe* suit, but only as a plaintiff in his own suit, and the petitioner Boehm has no status except as an intervenor therein.

As stated by the Circuit Court of Appeals in its opinion, the sole question presented to Judge Woolsey and presented to the Circuit Court of Appeals was the "limited issue whether the rules, assuming that they are valid, go to the jurisdiction of the judge" (R. 1029). Judge Woolsey held that the two rules absolutely deprived Judge Manton of the jurisdiction he otherwise would have had by virtue of his designation to hold a District Court. The Circuit Court of Appeals held that the rules, at most, were merely directory and that the failure to observe the same did not and could not deprive Judge Manton of jurisdiction.

On account of the vast interests involved, both public and private, and of the critical conditions requiring prompt action for the protection of said interests, appeals from said orders, and from an earlier order granting the petitioner herein leave to file his bill (R. 7), were promptly perfected and brought on for hearing before the Circuit Court of Appeals on November 14, 1932. On December 7, 1932, that Court handed down its opinion reversing all three orders appealed from and formal orders were entered on December 14, 1932 (R. 1036). Due to the delays arising from petitioner's motion to amend the opinion of the Circuit Court of Appeals so as to free him from costs, the final order for mandate was entered on December 29, 1932 (R. 1047).

However, despite the emergency conditions and the great and complicated interests involved, which the petitioner himself sets forth in his bill of complaint (R. 22, 23, 26-30, 34-39), his petition for certiorari was not filed in this Court until February 17, 1933, or served on respondents until February 20, 1933.

It is obvious, of course, that in a receivership of a great property the situation does not remain static. Many things have necessarily occurred in the administration of the receivership (involving the expenditure of millions of dollars) since Judge Woolsey's order of October 18, 1932, which have materially altered the situation, and make impossible the restoration of the *status quo* of August 26, 1932, and which, we believe, should be called to the attention of the Court,

although—while of record in the *Brake Shoe* suit—they are not in the record before the Supreme Court on this petition. We mention some of the more important in a note at the end of this brief (p. 19, *infra*).

There is no foundation in the record for the statement contained on page 3 of the Petition that "a simple contract creditor, with the consent of Interborough and Manhattan, two railroad corporations, obtained the appointment of friendly receivers for both corporations, in spite of the warning of this Court against such practices" in *Harkin* v. *Brundage*, 276 U. S. 36, and *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334.

There is absolutely nothing in the record to sustain, or, indeed, any basis of fact to justify, in any aspect thereof, the statement found on page 3 of the Petition that "The New York Bar, and the Judges of the District Court, cannot understand the repeated flouting of the effective rules governing equity receiverships in this district."

## Summary of Argument.

**1. It was not necessary for the Circuit Court of Appeals to make any determination as to the validity or effect of the Division of Business Order in order to sustain the validity of the orders appointing receivers made by Judge Manton [Answering Petitioner Johnson's Point 1 (a)].**

**2. The finding in the Order of Designation that the public interest required the designation is conclusive upon the Court and litigants [Answering Petitioner Johnson's Point I (b) and (c) and Boehm's Point II].**

**3. Rules 1-a and 11-a were at most directory and the failure to observe the same did not deprive Judge Manton of jurisdiction [Answering Petitioner Johnson's Point II].**

**4. The petitioner could have made all of his objections to the receivership on the return day (September 22, 1932) of the order to show cause respecting the appointment of temporary Receivers without intervention in the Brake Shoe**

**suit and without the necessity of filing an independent suit such as the Johnson suit [Answering Petitioner Johnson's Point III].**

**5. None of the matters presented in Point IV (Petitioner's Brief, p. 21) were considered before Judge Woolsey or passed upon by him or considered or passed upon by the Circuit Court of Appeals, and they are not involved in this petition [Answering Petitioner Johnson's Point IV].**

## POINT ONE.

[Answering Petitioner Johnson's Point I, Subdivision (a).]

**It was not necessary for the Circuit Court of Appeals to make any determination as to the validity or effect of the Division of Business Order in order to sustain Judge Manton's power to appoint Receivers in the *Brake Shoe* suit.**

The Circuit Court of Appeals, in reaching the decision sought to be reviewed, did not even advert to the Division of Business Order, and no weight was given to it on behalf of the respondents-appellants in their argument and briefs before the Circuit Court of Appeals.

If we assume, for argument's sake, that the Division of Business Order was absolutely void, such invalidity in no way affected the force and effect of the Designation Orders, and under those orders, we submit, Judge Manton had ample power to appoint receivers. Obviously, the mere fact adverted to in petitioner's brief that somebody bound the Designation Order and the Division of Business Order together for filing purposes, has no bearing on the situation. Neither order in any way was dependent upon or referred to the other.

## POINT TWO.

[Answering Petitioner Johnson's Point I, Subdivisions (b) and (c) and Boehm's Point II.]

**The finding in the Order of Designation that public interest required the designation is conclusive upon the Court and litigants.**

(a) Judge Woolsey expressly refused to examine into the propriety of the Designation Order (R. 698) and the Circuit Court of Appeals held that it would not examine into the facts affecting the question of public interest (R. 1032).

The motion of Boehm expressly requested a determination by Judge Woolsey that the Designation Order and the Division of Business Order be vacated and set aside (R. 134). Judge Woolsey's order denied this motion "for want of jurisdiction" (R. 728, 729). No appeal was taken by the petitioners from this order of denial and the time to appeal has expired, and, accordingly, we submit that the propriety of the Order of Designation is not before the Court.

(b) Obviously, if the validity of the designation made by the Chief Justice of the United States or by a Circuit Justice or by the Senior Circuit Judge pursuant to the authority of Section 22, Title 28, of the United States Code could be questioned by litigants, either directly or collaterally, on the ground that the public interest did not, in fact, require the designation, chaos would result in the administration of justice in the Federal Courts. Litigants would go before such a designated Judge at the peril that at any time the whole proceeding might be held to be entirely void, either in the suit itself or in some concurrent or subsequent collateral suit, on the ground that the Judge had been entirely without jurisdiction, either because of lack of public interest at the time he was designated, or because the public interest originally justifying the designation had ceased to exist at the time of the actual proceeding before him.

Even assuming, for argument's sake, that the question as to whether, in fact, public interest justified his designation might be raised by a litigant involved in a proceeding being heard before a designated Judge, the question certainly cannot be determined and the whole proceeding before the designated Judge set at naught upon a mere *ex parte* assertion that no such public interest existed, made in a collateral suit. It is solely on the basis of such *ex parte* assertions made in the *Johnson* suit that this Court is asked to determine that there was no public interest sustaining the Designation Order.

On the merits on the right to question public interest, we need add nothing to what was said by Judge Learned Hand for the Circuit Court of Appeals (R. 1032), as follows:

> "The vacating decree at bar properly refused to consider the validity of the order of designation of August twenty-fifth, but the appellees attack it here. They say that it appears both from the affidavit of Quackenbush, and from an opinion of the Circuit Judge in the American Brake Shoe Company suit, rendered after the vacating decree, that the only public interest supporting it was the fear that a trust company might be appointed receiver; and that this is not the kind of interest contemplated by the statute. Even so, the order conferred the statutory authority upon the designated judge. The power to designate, granted by 28 U. S. C. A. Sec. 22, is plainly administrative, and parties are not subject to the peril that everything decided may be upset, unless they can satisfy another court that there was adequate occasion for its exercise. The situation is the same as in People ex rel. Saranac Land & Timber Co. v. Extraordinary Special & Trial Term of Supreme Court, 220 N. Y. 487, 116 N. E. 384, for it does not matter that the condition is the 'public interest,' rather than the appointing judge's 'judgment' of that interest. Section 22 was indeed originally the same as sections 17, 20 and 21 in this regard (28 U. S. C. A. secs. 17, 20, 21), but the section was recast generally in 1922 (42 Stat. 639 [28 U. S. C. A. sec. 22]), and the failure to retain the original phrase was certainly not intended to have such far-reaching consequences. It cannot be that the act of the

> Chief Justice, for example, or of a Circuit Justice, is to be subjected to a scrutiny when designating a Circuit Judge, to which it is not open in the case of a District Judge. The power can indeed be abused, but the remedy may be worse than the evil; it is not to the courts that the public must look for correction."
>
> See *United States* v. *Gill*, 292 Fed. 136 (C. C. A. 4th, 1923).

Point II made by Boehm in her brief has, we submit, no merit. The public interest involved warranting a designation by the Chief Justice or a Circuit Justice or the Senior Circuit Judge may obviously attach to a particular case. The making of designations for the trial of a particular case or a class of cases has been a uniform practice (R. 554, 555, 655, 659, 660, 661, 662). The right to do so was approved in *United States* v. *Gill*, 292 Fed. 136 (C. C. A. 4th, 1923).

## POINT THREE.

[Answering Petitioner Johnson's Point II.]

**Rules 1-a and 11-a were at most directory and the failure to observe the same did not deprive Judge Manton of jurisdiction.**

So-called Rules 1-a and 11-a were ineffective to deprive a designated Judge of jurisdiction and to render his acts *coram non judice.*

The petitioner Johnson has now apparently abandoned Rule 1-a, which provided in effect that a designated Judge could do "such work only" as the Senior District Judge permitted. Boehm, in her brief, gives no real support to Rule 1-a.

Rule 11-a merely directs where applications for the appointment of receivers shall be made, i. e., "to the judge assigned to hold the Bankruptcy and Motion Part of the business of the court and to no other judge," i. e., whether he be a designated Judge or a District Judge.

The petitioner claims that the rule was made under the authority of a specific statute, to wit, Section 23 of the Judicial Code (Sec. 27, Title 28 of the United States Code) (Petitioner's Brief, p. 19). This section provides that, "In districts having more than one district judge, the judges may agree upon the division of business and the assignment of cases for trial in said district: * * *."

Obviously, this statute has no bearing whatsoever on Rule 11-a. A rule which requires a litigant to make his application for a receiver to the Judge sitting in the Motion Part, has no relation whatsoever to the division of business between the individual Judges. An agreement as to the division of business among the Judges is an arrangement by which they determine from day to day, or week to week, as to what individual Judge shall actually sit on a particular day in the Motion Part, as well as in the other parts of the Court. Obviously, notwithstanding Rule 11-a, disagreements might frequently arise as to who was actually to sit in the Motion Part.

**If Rules 1-a or 11-a be more than directory, they are obviously invalid.**

Section 731, Title 28 of the United States Code is the sole source of power of the District Court to make rules. It provides as follows:

> "Sec. 731. Rules of practice in district courts. The district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under section 730 of this title, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

Rules 1-a and 11-a are invalid because, contrary to the provisions of this statute, (a) they are inconsistent with

many laws of the United States, (b) they are inconsistent with rules prescribed by the Supreme Court, (c) they are not necessary or convenient for the advancement of justice and the prevention of delays in proceedings, but will have the contrary result, and (d) they are not rules of *practice*, but alleged rules of jurisdiction.

(a) Rules 1-a and 11-a are inconsistent with Section 13, Title 28 of the United States Code (Sec. 9 of the Judicial Code), which provides that District Courts as courts of equity "shall be deemed always open," and "*any district judge* may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court." (Italics ours.)

Furthermore, under Section 22 of Title 28 of the United States Code (Sec. 18 of the Judicial Code), a Circuit Judge designated to hold a District Court by the Chief Justice of the United States, the Circuit Justice of any circuit, or the Senior Circuit Judge thereof, "shall have all the powers and rights and perform all the duties of a judge of the district," excepting only "the power of appointment to a statutory position or of permanent designation of a newspaper or depository of funds," and by Section 23 of said title (Sec. 19 of the Judicial Code) it is made his duty to discharge all the judicial duties for which he is so appointed; and "all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district."

With respect to the powers of a Judge so assigned, this Court said, in *Ex parte United States* (226 U. S. 420, 423):

> "It is moreover beyond question that the statutes while contemplating as a general rule the holding of District Courts by district judges and as a general rule for holding Circuit Courts of Appeal by circuit judges, nevertheless expressly directs when the occa-

> sion requires (Sec. 18) the assignment by the senior judge, or the circuit justice, or the Chief Justice of a circuit judge to hold a District Court and endows a judge so assigned with all the authority of a district judge (Sec. 19), giving power in case of such designation to hold separately at the same time a District Court in such district, and to discharge all the judicial duties of the district judge therein (Sec. 14). The statute therefore clearly gives to the circuit judges the rights and powers of judges of the new District Courts, and calls such powers into play when assigned according to law." (References in above quotation are to sections of Judicial Code.)

There are numerous other laws of the United States with which Rules 1-a and 11-a are also inconsistent, as, e. g., Sections 17, 18 and 23, Title 28, United States Code.

(b) Rules 1-a and 11-a are inconsistent with Rule 6 of the Federal Equity Rules, which provides that

> "The judge may *at any time and place*, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings, advancement, conduct and hearing of causes." (Italics ours.)

Furthermore, Rule 11-a in terms purports to regulate the practice "in equity causes," but it did not receive the concurrence of a majority of the Circuit Judges (R. 713, fol. 2139), as Federal Equity Rule 79 requires.

The Circuit Court of Appeals did not find it necessary to pass on the validity of said so-called Rules 1-a and 11-a, because it held that in any case they did not have the effect of depriving a designated Judge of the jurisdiction vested in him by the statute and that any question as to the violation of said rules could not be raised in the manner the petitioner has attempted to raise it.

We deem it unnecessary to add to the cogent reasons of Judge Learned Hand in support of that view (R. 1028 *et seq.*).

## POINT FOUR.

[Answering Petitioner Johnson's Point III.]

**The petitioner could have made all of his objections to the receivership on the return day (September 22, 1932) of the order to show cause respecting the appointment of temporary Receivers without intervention in the *Brake Shoe* suit and without the necessity of filing an independent suit such as the *Johnson* suit.**

The Circuit Court of Appeals did not hold "that petitioner could attack Judge Manton's orders only by intervention in the *Brake Shoe* case," as is stated in Johnson's brief (p. 20). It held that the petitioner could not collaterally attack said orders.

It held that on the return of the rule *nisi* in the order appointing temporary Receivers, the petitioner could have appeared, as he was expressly invited by the order to do, and could have asked that the cause be transferred to another Judge and that other Receivers be appointed, and that his appeal from the denial of his request would have been entertained by the Circuit Court of Appeals (R. 1033).

Equity Rule 37 does not purport to prevent, and did not in fact prevent, the petitioner as a creditor from appearing on September 22, 1932, the return day of the temporary order, either specially or generally, and challenging the jurisdiction or opposing the continuance of the receivership.

The temporary order appointing Receivers provided—

> "upon the hearing thereon any other creditor of the defendant or any other party in interest may be heard" (Vol. II, p. 62).

Under the practice followed by the Circuit Court of Appeals for the Second Circuit, the petitioner could have filed a special appearance, without intervention, for the purpose of moving to vacate the receivership on all the grounds set

forth in the bill of complaint and motions in the *Johnson* suit and could have appealed to the Circuit Court of Appeals from a denial of his motion and been heard on the merits.

*Kingsport Press, Inc.* v. *Brief English Systems*, 54 Fed. (2d) 497.

*Christian* v. *Hoe, Inc.*, decided by Circuit Court of Appeals, 2nd Circuit, Feb. 20, 1933, not yet reported.

*Mitchell* v. *Lay*, 48 Fed. (2d) 79, 84, 85 (C. C. A. 9th).

*Pacific Northwest Packing Co.* v. *Allen*, 109 Fed. 515 (C. C. A. 9th).

The statement at the bottom of page 16 of Boehm's brief, that "The complainants (meaning Johnson and Boehm) * * * had no notice of the application"—i. e., the order of August 26, 1932, appointing Interborough Receivers, is, obviously, untrue, for the Johnson complaint which was filed on September 21, 1932, sets forth all the facts about the appointment of Interborough Receivers (R. 14). Boehm, counsel for Lillian Boehm, was also of counsel on the Johnson complaint (R. 48). In fact, both Mr. Louis Boehm, counsel, and Mr. Charles Franklin appeared before Judge Manton on behalf of their clients on September 6, 1932 (R. 566).

## POINT FIVE.

[Answering Petitioner Johnson's Point IV.]

**None of the matters presented in Point IV (Petitioner's Brief, p. 21) were considered before Judge Woolsey or passed upon by him or considered or passed upon by the Circuit Court of Appeals, and they are not involved in this petition.**

The petitioner did not, either in his bill of complaint, his petition for the vacation of Judge Manton's orders or in argument before Judge Woolsey, attack the orders appointing temporary Receivers as being "consent decrees" "based upon a bill of a simple contract creditor."

The bill will be found at page 13 of the record, the petition at page 118, and the minutes of the hearing before Judge Woolsey, which the petitioner insisted on having incorporated in the record, at page 823.

The petitioner in his bill asked for the appointment of different receivers and set forth at length the reasons why such appointment was imperative (R. 35 *et seq.*).

The charge that the proceeding for the appointment of a receiver of the Interborough was a "collusive one" to obtain friendly receivers (Petitioner's Brief, p. 22)—which charge was based on *ex parte* allegations founded on inferences contained in the *Johnson* bill of complaint (R. 70, 72, 74, 75, 24, 25, 26)—was not argued before Judge Woolsey (R. 848, fol. 2543; p. 931, fol. 2793) and was not considered by the Circuit Court of Appeals and is not before this Court.

## IN CONCLUSION.

**The writ of certiorari should be denied.**

Respectfully submitted,

NATHAN L. MILLER,
Counsel for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of the Interborough Rapid Transit Company.

NATHAN L. MILLER,
WILLIAM W. MILLER,
CHARLES A. BOSTON,
CARL M. OWEN,
of Counsel.

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The undersigned join in the foregoing brief and submit that the ~~return~~ writ of certiorari should be denied.

CHARLES E. HUGHES, JR.,
ALLEN S. HUBBARD,
Counsel for William Roberts, as Receiver of Manhattan Railway Company.

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On behalf of the respondent Committee for the protection of the holders of Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, of Interborough Rapid Transit Company, the undersigned concurs in the arguments advanced in the foregoing brief and submits that the petition for a writ of certiorari should be denied.

CLOYD LAPORTE,
Counsel for Charles Hayden and others, as Committee for the protection of the holders of Ten-Year Six Per Cent. Gold Notes of Interborough Rapid Transit Company.

The undersigned joins in the foregoing brief and, in addition, urges that the damage and injury which would result to the Bondholders represented by the Protective Committee named below and to the other creditors of Manhattan Railway Company require that the petition be denied.

PAXTON BLAIR,
Counsel for Van Santvoord, Merle-Smith and others, as the Protective Committee for Manhattan Railway Company Consolidated Mortgage Four Per Cent. Gold Bonds, Intervenors in the suit of The American Brake Shoe and Foundry Company v. Interborough Rapid Transit Company, now pending in the District Court of the United States for the Southern District of New York.

BOYKIN C. WRIGHT,
of Counsel.

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**Note.**

One of the most urgent matters which the complainant Johnson set forth in his bill as requiring immediate action was the payment by the Interborough of the interest on the $40,683,000 in principal amount of Consolidated Bonds of the Manhattan Railway Company as an item of rent under the Manhattan lease which would be due on October 1, 1932 (R. 36). An application of the Interborough Receivers for instructions with respect to the payment of this rent (R. 329) and a petition of the Manhattan Receiver requesting an order that this be paid (R. 366) were referred to Basil O'Connor as Special Master by an order of Judge Manton made November 7, 1932.

At the hearings before the Special Master, *Mr. Charles Franklin,* attorney herein for Johnson suing as a stockholder in the derivative right of the Manhattan Railway Company, appeared as attorney for the Manhattan Railway Company itself, which, as above stated, had intervened in the *Brake Shoe* suit on September 6, 1932.

In this connection it is to be noted that the *Johnson* bill was filed on September 21, 1932, and that a substantial portion of the bill is devoted to alleged claims of the Manhattan against the Interborough and to reasons as to why other receivers of Manhattan should be appointed (R. 25 *et seq.*). On September 24, 1932, a committee of stockholders of the Manhattan Railway Company, of which Nathan L. Amster is chairman and *Charles Franklin*, attorney for the petitioner Johnson, is a member, and for which Charles Franklin also acted as attorney, filed a petition of intervention in the *Johnson* suit (R. 144, 146), and an order granting said intervention was entered on September 26, 1932 (R. 142). At the annual stockholders' meeting of the Manhattan Railway Company held on November 11, 1932, Mr. Nathan L. Amster was elected President and Mr. Franklin was chosen as General Counsel, since which date Mr. Franklin has appeared at all of the proceedings in the Interborough Receivership in the *Brake Shoe* suit on behalf of the Manhattan Railway Company, and he was formally substituted as solicitor therefor on January 21, 1933. On December 7, 1932, Mr. Franklin, as attorney for the Manhattan Railway Company, made a motion in the *Brake Shoe* suit for the appointment of Mr. Amster as Receiver of the Manhattan Railway Company in place of Mr. Roberts, and the questions raised by this motion have been referred to the Special Master. We believe it is a fair inference from the record that the *Johnson* suit was brought only in the name of Johnson as a citizen of Kentucky in order to confer jurisdiction on the Federal Court, that the real plaintiff was Nathan L. Amster, and that Nathan L. Amster having become the President of the Manhattan Railway Company, and a Board of Directors thereof largely chosen by him having been put into office, the ostensible reason for a derivative suit has disappeared.

On November 30, 1932, Judge Manton ordered the payment by the Interborough Receivers of the interest then past due on the Consolidated Mortgage Bonds of the Manhattan Railway Company, involving an outlay on the part of the Receivers of approximately $817,000.

On November 17, 1932, the Chase National Bank of New York, as Trustee of the Second Mortgage of the Manhattan Railway Company, intervened and filed a bill to protect its rights as Trustee of the mortgage securing said bonds; requesting an impounding of income.

On December 20, 1932, an order was entered directing that all claims and demands against the Interborough Rapid Transit Company should be presented to the Receivers within three months from the date thereof, and providing that all claims and demands not presented within said period of three months should be barred from sharing in the benefits of the distribution of the proceeds of the properties of the Interborough Rapid Transit Company, pursuant to which order advertisement of the terms thereof has been made in newspapers specified in said order and many claims have been presented and approved pursuant thereto.

On December 21, 1932, Judge Manton ordered the payment by the Interborough Receivers of the interest due December 1, 1932, on the Second Mortgage Bonds of the Manhattan Railway Company.

On December 21, 1932, the Interborough Receivers were ordered to pay certain taxes on the property of the Interborough Rapid Transit Company, amounting to approximately $557,000, some of which have been past due since 1928.

On December 21, 1932, the Interborough Receivers were directed to pay the interest and sinking fund due and payable on January 1, 1933, on all of the outstanding First and Refunding 5% Gold Bonds of the Interborough Rapid Transit Company, which involved a cash outlay of approximately $6,282,000. This outlay has subsequently been made by the Receivers pursuant to this order and in addition transfers of securities to meet the terms of the sinking fund have been made pursuant to the authority of said order.

On December 24, 1932, Arthur W. Loasby and others, as a Committee for the Stock and Voting Trust Certificates for Stock of the Interborough Rapid Transit Company, intervened.

On December 29, 1932, Judge Manton ordered the payment by the Interborough Receivers of past due taxes on the property of the Manhattan Railway Company amounting to approximately $817,000, and said taxes have subsequently been paid.

In addition, the Receivers have modified a number of contracts of the Interborough and have disaffirmed others; among others, they have obtained a substantial modification of the contract affecting wages.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. VII and No. VIII.

BENJAMIN F. JOHNSON,
*Petitioner,*
*against*
MANHATTAN RAILWAY COMPANY, *et al.*,
*Respondents.*

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
*Respondent,*
*against*
INTERBOROUGH RAPID TRANSIT COMPANY,
*Respondent.*

IN THE MATTER
OF THE
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., RECEIVERS OF INTERBOROUGH RAPID TRANSIT COMPANY, RESPONDENTS.

ALSO ON BEHALF OF RESPONDENT COMMITTEE FOR THE PROTECTION OF THE HOLDERS OF TEN-YEAR SIX PER CENT. GOLD NOTES DUE OCTOBER 1, 1932, OF INTERBOROUGH RAPID TRANSIT COMPANY.


NATHAN L. MILLER,
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

---

No. 711 AND No. 721.

---

BENJAMIN F. JOHNSON,
Petitioner,

against

MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

---

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

---

IN THE MATTER

OF THE

INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

---

**BRIEF ON BEHALF OF VICTOR J. DOWLING AND THOMAS E. MURRAY, JR., RECEIVERS OF INTERBOROUGH RAPID TRANSIT COMPANY, RESPONDENTS.**

**ALSO ON BEHALF OF RESPONDENT COMMITTEE FOR THE PROTECTION OF THE HOLDERS OF TEN-YEAR SIX PER CENT. GOLD NOTES DUE OCTOBER 1, 1932, OF INTERBOROUGH RAPID TRANSIT COMPANY.**

This Court has separately allowed applications of the petitioner Johnson, the plaintiff in the suit of *Benjamin F. John-*

*son* v. *Manhattan Railway Company, and others,* and of the petitioner Boehm, intervenor in that suit, for certiorari to the Circuit Court of Appeals for the Second Circuit to review the decision of that Court (R. 775) reversing the order of Judge Woolsey made on October 18, 1932, which vacated as *coram non judice* an interlocutory order of Judge Manton, as a Circuit Judge designated to hold a District Court for the Southern District of New York, appointing temporary receivers of the Interborough Rapid Transit Company in the suit of the *American Brake Shoe and Foundry Company* v. *Interborough Rapid Transit Company,* and a score or more of other interlocutory orders made in the course of the administration of said receivership (R. 725-729)—the "Vacating Order."

The Circuit Court of Appeals also reversed an order of the District Court made on September 20, 1932, in the *Johnson* suit granting the complainant leave to file his bill against the Interborough Rapid Transit Company and the Manhattan Railway Company and their Receivers, and an order made by Judge Woolsey on the Court's own motion on October 18, 1932, consolidating the *Johnson* suit and the *American Brake Shoe* suit under the third title above (R. 775, 722).

In the petitions for certiorari, petitioners complained solely of the reversal of Judge Woolsey's "Vacating Order" of October 18, 1932.

The motions of both the plaintiff Johnson and the intervenor Boehm before Judge Woolsey prayed for an order vacating and setting aside the order of Judge Manton, dated August 25, 1932, designating himself to hold a District Court, and also the order of Judge Manton, dated August 25, 1932, designating himself to hear an application for the appointment of Receivers (the Division of Business Order) (R. 115, fols. 344, 345, and R. 131, fols. 392, 393). Judge Woolsey denied the motions of Johnson and Boehm in so far as they sought to vacate the Designation Order and the Division of Business Order (R. 728-729). No appeal to the Circuit Court of Appeals was taken by Johnson or Boehm from this denial.

Petitioners have filed separate briefs. We shall answer both in one.

## Statement of Facts.

*The Interborough Rapid Transit Company* is a New York corporation. On August 26, 1932, its capitalization consisted substantially of the following:

| | |
|---|---|
| First and Refunding Mortgage 5% Gold Bonds (secured by a mortgage to the Guaranty Trust Company of New York) outstanding in the hands of the public (R. 159)..... | $132,000,000.00 |
| Ten-Year Secured Convertible 7% Gold Notes secured by a pledge to the Bankers Trust Company, Trustee, of approximately $54,000,000 in principal amount of the above-mentioned First and Refunding Bonds (R. 159)..... | 31,672,100.00 |
| *These Notes matured on September 1, 1932,* and the Interborough was without funds with which to pay the same or to pay an instalment of interest due on that date of. (R. 165) | 1,108,523.50 |
| Unsecured Ten-Year Six Per Cent. Gold Notes (R. 159), due October 1, 1932..... | 10,500,000.00 |
| On which date there was also payable an instalment of interest in the amount of.. The Interborough was without funds to pay the principal and interest of these Notes (R. 165). | 315,000.00 |
| Floating indebtedness for materials, equipment, taxes and supplies of over..... (R. 164) | 2,500,000.00 |
| Common capital stock of the par value of.. (R. 158) | 35,000,000.00 |

The principal asset of the Interborough consists of its lease of the subway properties in the City of New York, granted to it by the City of New York under a contract known as Contract No. 3. The Interborough is also the lessee and operator of all of the elevated railroad properties belonging to the Manhattan Railway Company under a lease dated

January 1, 1903. It also owned certain extensions of the elevated railways and had rights under a trackage contract (R. 157).

*Manhattan Railway Company.* On August 26, 1932, the capitalization of the Manhattan Railway Company consisted of:

| | |
|---|---|
| Consolidated Mortgage 4% Bonds (First Mortgage Bonds) in the principal amount of (R. 160) ..... interest on which is payable on the 1st days of April and October in each year. | $40,683,000.00 |
| Four Per Cent. Second Mortgage Bonds in the principal amount of (R. 160) ..... the interest on which is payable on the 1st days of June and December in each year. | 4,523,000.00 |
| Common Stock of the par value of (R. 159) .. | 60,000,000.00 |

All of the railway property of the Manhattan Railway Company is leased to the Interborough by the aforesaid lease, pursuant to which as rental the Interborough was obligated to pay, among other things, all of the taxes on the property of the Manhattan or its franchises, the interest due on the above-mentioned Consolidated Bonds and Second Mortgage Bonds, and certain dividends on the Manhattan stock (R. 159, 160).

The result is that on August 26, 1932, the Manhattan Railway Company, as a company, was not in possession of any assets whatsoever except a small amount of cash on hand. Its property was then and still is in the hands of the Interborough as lessee thereof (R. 254-255). As Boehm in her brief states (p. 3): "Under this lease arrangement, Manhattan became a mere corporate shell and has so continued since 1903."

## I.

### Brake Shoe Suit.

On August 26, 1932, The American Brake Shoe and Foundry Company filed its bill of complaint herein, in which it

asked for the appointment of a receiver of the Interborough Rapi' Transit Company (R. 153). The Interborough Rapid Transit Company thereupon on the same date filed its answer pursuant to the authority of its Board of Directors (fols. 519-521), admitting all the allegations of the bill of complaint and consenting to the appointment of a receiver or receivers (fols. 511-518).

The bill of complaint showed that the plaintiff was a Delaware corporation, that the defendant Interborough was a New York corporation (R. 154, fol. 460), and that the defendant owed the plaintiff $27,530.89, payment of which had been duly demanded but refused. The suit was stated to be on behalf of complainant and all others who might join (R. 153). The complaint and the answer disclosed that the Interborough was in default in a substantial manner under its obligations under its aforesaid First and Refunding Mortgage securing bonds outstanding in the hands of the public in the principal amount of more than $132,000,000, and securing additional bonds in excess of $54,000,000 pledged as security for its Collateral Notes; that it was in default to a substantial degree under the terms of its lease of the elevated railroad of the Manhattan Railway Company; that it was badly in arrears in payment of taxes on its own property; that it had due and owing (or would have due and owing within a few days from the date of the appointment of the Receivers) indebtedness, *which it was absolutely unable to pay,* for supply bills, rent under the Manhattan lease, principal and interest of funded indebtedness and past due taxes in an amount in excess of $48,000,000 (R. 164, 165). The complaint contained the usual prayer for an administration of assets, an injunction and receivers (R. 168, 169).

Thereupon, on August 26, 1932, Judge Manton, holding a District Court for the Southern District of New York pursuant to designation, signed an order appointing Victor J. Dowling and Thomas E. Murray, Jr., temporary Receivers of the Interborough (R. 180). The said order further directed—

> "that the parties hereto show cause before the undersigned * * * on the 22nd day of September, 1932,

> * * * why the said receivership should not be continued during the pendency of this suit and upon the hearing thereon any other creditor of the defendant or other party in interest may be heard" (R. 184, fol. 551).

On September 6, 1932, the Manhattan Railway Company (following the procedure adopted in *Re Metropolitan Street Railway Receivership*, 208 U. S. 90) filed its petition for leave to intervene and asked that the receivership be extended to embrace the properties of the Manhattan Railway Company (R. 248-255). Thereupon, on the same date, Judge Manton appointed William Roberts as temporary Receiver of the Manhattan Railway Company (R. 196-200). The order of appointment contained the same provision as was found in the order appointing temporary Receivers of the Interborough, to wit, that the parties should show cause on September 22, 1932, as to why the receivership should not be made permanent and

> "upon the hearing thereon any other creditor of the defendant or other party in interest may be heard" (R. 199, 200).

Committees representing the Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds (R. 189), the Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes due September 1, 1932 (R. 191), the Interborough Rapid Transit Company Ten-Year 6% Gold Notes due October 1, 1932 (R. 193), the Manhattan Railway Company Consolidated Mortgage Gold 4% Bonds (R. 201), the Seven Per Cent. Guaranteed Stock of the Manhattan Railway Company (R. 221), the Central Hanover Bank and Trust Company, as Trustee under the Consolidated Mortgage of the Manhattan Railway Company (R. 214), the Guaranty Trust Company of New York, as Trustee under the First and Refunding Mortgage of the Interborough Rapid Transit Company (R. 226) and others have petitioned for and been granted intervention in the *Brake Shoe* suit, or on order been made parties (R. 2, 3), and all are supporting the receivership.

On September 22, 1932, no one opposing, Judge Manton determined to make the appointments of Dowling and Murray as Interborough Receivers and the appointment of Roberts as Manhattan Receiver permanent and formal orders to that effect were accordingly entered on September 28, 1932 (R. 223).

Between September 28, 1932, and October 18, 1932, many administrative orders of one kind or another were made by Judge Manton in the *Brake Shoe* suit (R. 226-231).

There was in force, at all times since it was made, a standing designation of Judge Manton to hold a District Court made on March 20, 1930 (R. 708, fol. 2122; R. 661). On August 25, 1932, as Senior Circuit Judge, he made another designation of himself to hold a District Court for the Southern District of New York "during the period beginning August 25, 1932," and particularly to hear and determine all applications and proceedings in the matter entitled "American Brake Shoe and Foundry Company vs. Interborough Rapid Transit Company" (R. 177).

Petitioner Johnson says that his bill and supplemental bill show that the *Brake Shoe* suit was collusive (Johnson brief, p. 2). There is no such averment. The most that can truthfully be said is that evidence was pleaded from which the petitioners now ask the Court to draw that inference.

Petitioner Boehm charges in her brief that the purpose of the receivership was to enable the Interborough to rid itself of the Manhattan lease and to bring about a foreclosure of the Manhattan first mortgage and a purchase of the property for a nominal sum, and she even suggests that a receivership could have been avoided (Boehm brief, pp. 8, 9). That is only one of the many reckless and unwarranted statements scattered through the petitioners' briefs, which are wholly irrelevant to any question now before the Court and which it would unduly prolong this brief to answer in detail.

The fact is that both petitioners allege in their respective bills that the appointment of receivers of the Interborough was imperative (R. 36, 96), and the truth is that the necessary purpose and effect of an equity receivership is to secure equitable treatment of all interests and to protect them from

the very consequences which said petitioner Boehm charges are the objects of the suit, and she herself has to admit that as far as the Manhattan interests are concerned Judge Manton is affording such protection (Boehm brief, p. 12).

The suggestion that Interborough obligations of $48,000,000 maturing shortly after the appointment of receivers could have been refunded or refinanced in September, 1932, like many of petitioners' statements, is not to be taken seriously.

Petitioner Boehm's statements regarding the relations between the Manhattan and the Interborough Companies (Boehm brief, pp. 2-12) show that difficult and important questions for adjudication are involved. See *Johnson* Supplemental Complaint (R. 54). Said petitioner grudgingly refers (*Id.*, p. 12) to the protection to the Manhattan interests already afforded by the Court "upon the application of the Mortgage Trustee," which, it may be observed in passing, has intervened in the *Brake Shoe* suit and is supporting the receivership. With equal frankness she might also have acknowledged that the rights and interests of the Manhattan Company are being ably and vigorously asserted and defended by its receiver and his counsel.

The petitioners seek the appointment of receivers of both Companies in their representative action on behalf of the Manhattan Company, despite the fact that a receiver of that Company has already been appointed on its own petition and after its voluntary intervention in the *Brake Shoe* suit.

On their own showing the petitioners are seeking the appointment of receivers to represent conflicting interests in a suit which they can control, and their assertion of interests transcending the issues between the parties to the suit (Boehm brief, p. 14) must be weighed in the light of the fact that the *Johnson* suit was only brought after Judge Manton had refused to make the palpably unnecessary appointment of additional receivers of the Manhattan nominated by the petitioners' counsel (R. 567, 569).

The petitioners allege in their bills and emphasize in their briefs the fact that the Manhattan and Interborough Companies have common directors. They omit to inform the

Court, however, that the Manhattan directors on the Interborough board are there perforce of contract rights of the Manhattan Company to have representation on the Interborough board (R. 670).

## II.

### The Johnson Suit.

The *Johnson* suit was, it appears, an outgrowth of the *Barber* suit. On August 29, 1932, one Harry Barber, a stockholder of Manhattan Railway Company, obtained an order from Judge Manton, holding a District Court pursuant to designation, permitting Barber to file a complaint in which the Interborough and its Receivers were made parties defendant (R. 565, fol. 1694; R. 652), and, pursuant to this leave, on August 29, 1932, the bill of complaint was filed with the United States District Court for the Southern District of New York, entitled "Harry Barber, complainant, against Manhattan Railway Company, Interborough Rapid Transit Company, Victor J. Dowling and Thomas E. Murray, Jr., as Receivers of Interborough Rapid Transit Company, and others," wherein the complainant as a mere stockholder of the Manhattan, after setting forth the provisions of the Manhattan lease, prayed that an account be taken as between the Interborough and the Manhattan under the Manhattan lease, and that a Receiver be appointed for the Manhattan Railway Company (R. 564, fol. 1692; R. 613).

On September 6, 1932, a hearing was had before Judge Manton on an order to show cause obtained in the *Barber* suit as to why receivers of Manhattan should not be appointed, and there appeared, among others, Charles Franklin, who stated that he was counsel for a Committee called "Manhattan Common Stockholders' Protective Committee," composed of Nathan L. Amster and others, including Charles Franklin himself, and also on behalf of Brookin Corporation and Llewellyn Hernly, who had deposited stock with said Committee (R. 566, fol. 1696). Louis Boehm also appeared as an attorney, who stated that he was counsel for certain stockholders of Manhattan (R. 566, fol. 1696).

Said Franklin and Boehm stated that their clients were intervening in the *Barber* suit (R. 566, fol. 1697; R. 567, fol. 1700), and at that time a petition for intervention in the *Barber* suit on behalf of Franklin, said Manhattan Railway Company Common Stockholders' Committee and the Brookin Corporation was presented to Judge Manton.

Judge Manton informed counsel that on the application of the Manhattan Railway Company itself in the *Brake Shoe* suit he had appointed William Roberts to be Receiver of the Manhattan Railway Company (R. 566, fol. 1698). Thereupon Mr. Franklin urged Judge Manton to appoint Nathan L. Amster as *an additional* Receiver as being the relief which he particularly desired at the time (R. 567, fol. 1701). Mr. Boehm limited his request to the appointment of Mr. Malcolm Sumner as a co-receiver with Mr. Roberts (R. 569, fol. 1705). Judge Manton expressed the opinion that two receivers of the Manhattan were not needed at the time (R. 568). Obviously, Judge Manton was not authorized in the *Barber* suit, on such a mere stockholders' bill without answer, to appoint any receivers of the Manhattan.

The affidavit of Charles Franklin, attorney for Johnson (R. 683, fol. 2048), and the affidavit of Louis Boehm, also of counsel for Johnson (R. 688, fols. 2063, 2064), make it clear that the subsequent institution of the *Johnson* suit arose because of their disappointment over the failure of Judge Manton to appoint either Mr. Amster or Mr. Sumner as a co-receiver, with Roberts, of the Manhattan Railway Company, as suggested by them in the *Barber* suit.

Under the express invitation given by the terms of the order appointing temporary Receivers of the Interborough and the express invitation given by the terms of the order appointing Roberts temporary Receiver of Manhattan, Mr. Franklin, as representing the stockholders on whose behalf he had intervened in the *Barber* suit, and Mr. Boehm, as representing his wife, Lillian Boehm, could have appeared in the *Brake Shoe* suit on September 22, 1932, *without intervention therein* and have made all of the contentions with respect to the validity of the appointment of Receivers by Judge Manton which they have subsequently made. They

could have asked for the appointment of other receivers, or for the transfer of the cause to another Judge on the ground that Rules 1-a and 11-a (quoted in the footnote, p. 12) so required, and according to the settled practice in the Second Circuit, as stated by Judge Learned Hand (R. 1033), they could have appealed from an adverse decision. Instead, they decided to treat Judge Manton's orders as utter nullities, as mere blank paper, and to institute an independent suit.

On September 20, 1932, the *Johnson* suit was begun when United States District Judge Francis G. Caffey signed an order granting Benjamin F. Johnson leave to file his bill of complaint in which he made the Manhattan Railway Company, William Roberts as temporary Receiver thereof, Interborough Rapid Transit Company, Victor J. Dowling and Thomas E. Murray, Jr., as temporary Receivers thereof, the City of New York and The American Brake Shoe and Foundry Company, defendants (R. 7). This is one of the orders from which an appeal was taken to the Circuit Court of Appeals and which was reversed by that Court. *No specification of error with respect to such reversal is made by the petitioners in this Court.*

Johnson's bill of complaint alleges that he is a resident of Kentucky and is the owner of 100 shares of stock of the defendant Manhattan Railway Company (R. 13). The action is alleged to have been brought by the complainant in his derivative capacity as a minority stockholder of the Manhattan Railway Company in his own behalf and in behalf of other stockholders (R. 14, fol. 42). *It is primarily a suit for an accounting* between the Manhattan and the Interborough Companies. The complaint stresses the grave danger to the Manhattan security holders unless the receiverships of the Interborough and the Manhattan are continued (R. 36, 37) and that the situation *"requires"* the Court to continue the receiverships with new receivers.

The complaint alleges that the appointment of receivers in the *Brake Shoe* suit was irregular and void for the specific reason that that was in contravention of Rules

1-a and 11-a* of the District Court (R. 15, 16). It further alleges various rights of the Manhattan Railway Company under the lease of its property to the Interborough, and the grave danger to the Manhattan Railway Company of a possible foreclosure of its Consolidated Mortgage (R. 36, fol. 107), and prays that the Designation Order be vacated, that the Division of Business Order be vacated, that the appointment of temporary Receivers of the Interborough be vacated, that the appointment of a temporary Receiver of the Manhattan be vacated, and that the Court appoint "independent receivers" for the Interborough and "independent receivers" for Manhattan (R. 43, fol. 129), and that, among other things, an account be taken of the sums due and owing the Manhattan by the Interborough (R. 44, fol. 131). Mr. Louis Boehm was of counsel on the bill of complaint which was signed and verified (R. 571) by Mr. Charles Franklin (R. 48, fol. 144).

On September 21, 1932, Judge Caffey also made an order in the *Johnson* suit on the consent of Franklin, attorney for Johnson, permitting Lillian Boehm to intervene therein as a party plaintiff (R. 138, fol. 413). The petition of Boehm for leave to intervene asserted that she was the holder of stock of the Manhattan Railway Company and also the holder of First Mortgage Bonds of the Manhattan Railway Company (R. 139, fol. 417), and also the holder of First and Refunding Mortgage Bonds of the Interborough (R. 140, fol. 418).

Having been permitted to intervene in the *Johnson* suit as a stockholder of the Manhattan, Lillian Boehm, on September 21, 1932, filed a bill of complaint (R. 80) therein, in which she asserted that her rights were based on the ownership of First and Refunding Bonds and of Ten-Year Secured Convertible 7% Gold Notes of the *Interborough*. Her complaint makes no mention of ownership of either stock or obligations of Manhattan. It contained allegations that were evidently taken to a large degree from the

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* 1-a. Any judge designated to sit in the District Court for the Southern District of New York, shall do such work only as may be assigned to him by the senior district judge.

11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy Rules), shall be made to the judge assigned to hold the Bankruptcy and Motion Part of the business of the court and to no other judge.

bill of complaint in the *Brake Shoe* suit (so stated Boehm's brief, p. 13). It alleged that under the circumstances it was imperative that there be appointed a receiver of the Interborough (R. 96, fol. 287), and that the appointments of Dowling and Murray should be set aside and independent receivers under properly constituted authority be appointed (R. 97, fol. 290). The prayer of the bill was that the Designation Order and the Division of Business Order be vacated, that the appointments of Dowling and Murray, and all other proceedings before Judge Manton be vacated, and that the Court appoint "independent receivers" of the Interborough (R. 108, 109).

On September 24, 1932, a Committee of Stockholders of the Manhattan, of which Nathan L. Amster was chairman, Charles L. Franklin a member and also counsel, intervened in the *Johnson* suit (R. 142, 144).

On October 3, 1932, Johnson filed a supplemental bill of complaint (R. 49) in which he claimed that—

> "In addition to the interest of complainant who has instituted this suit in his derivative right as a stockholder of Manhattan * * * for the benefit and protection of Manhattan and all stockholders similarly situated, *including bondholders and all others financially interested* in said company, * * *" (R. 50, fol. 148);

although neither in the original bill of complaint nor in the supplemental bill of complaint did Johnson allege the ownership of any bonds or anything other than Manhattan stock.

No answers to the complaints in the *Johnson* suit had been filed by any of the defendants in the *Johnson* suit at the time of Judge Woolsey's decision.

Three orders to show cause as to why all of the orders of Judge Manton in the *Brake Shoe* suit should not be vacated having been obtained by Johnson and Lillian Boehm in the *Johnson* suit (R. 114-117, 123-125, 130-132), these various orders were argued before Judge Woolsey on October 6, 1932 (R. 812-996). The questions before this Court arise from these orders to show cause. The minutes of the

hearing before Judge Woolsey were filed in the District Court pursuant to Judge Woolsey's direction (R. 997) and were included in the Transcript of Record at the insistence of counsel for Johnson.

On October 13, 1932, Judge Woolsey filed his opinion (R. 694-721).

On October 18, 1932, two orders were entered pursuant to the said opinion. The first order was an order made by Judge Woolsey on his *own motion* and "against the objection and protest" of the parties to the *Brake Shoe* suit (R. 722, fol. 2166) consolidating the *Johnson* suit with the *Brake Shoe* suit under the title of "In the Matter of the Interborough-Manhattan Receivership Proceedings." This order having been made and filed (R. 994, 995), Judge Woolsey then made his second order, the order vacating the orders of Judge Manton (R. 725). In this Vacating Order, Judge Woolsey denied the motions in so far as they sought to have vacated the Designation Order and the Division of Business Order (R. 728, 729, fols. 2184-2185). *No appeal was taken by Johnson or Boehm from the order of Judge Woolsey denying their motion to vacate the Designation Order and the Division of Business Order.*

No specification of error is made by the petitioners in respect of the reversal of the Consolidation Order. Although claiming that Rules 1-a and 11-a are jurisdictional, both petitioners Johnson and Boehm defend them as merely "calendar" rules (Johnson brief, p. 11; Boehm brief, p. 44).

## Brief of The City of New York.

Without having previously received a copy thereof, the parties hereto gave consent to The City of New York to file a brief as *amicus curiae*. The brief of the City as served is devoted to contentions which have no relationship whatsoever to the questions presented to this Court. If the brief of the City demonstrates anything pertinent, it is that public interest attached to the Interborough receivership proceeding. The City does not question the jurisdiction of Judge Manton (City's brief, p. 13).

## The Controversy.

As was stated by Judge Learned Hand in the opinion of the Court below (R. 1028):

> "The controversy does not touch the substantial relief asked by any of the parties; all acknowledge that the two railways are in such financial straits that a court of equity must take over their assets, to prevent their dismemberment by execution, attachment and the like. The plaintiffs, and those who have intervened, ask for receivers just as do the parties to the American Brake Shoe Company suit. *The dispute touches merely who shall be the receivers and who the Judge to have charge of the receivership.*" (Italics ours.)

Petitioner Boehm, at page 30 of her brief, says:

> "Petitioners were not seeking a complete disruption of the receivership proceedings. Substantially they sought only a removal of the proceedings to the proper district judge and an appointment of different and independent receivers."

See similar statements at page 26 of Boehm's brief.

As to who shall be receivers of the Interborough, we believe that there never *in fact* has been any real controversy. The *Johnson* bill makes no charges against the Interborough Receivers, except the inconsequential claim that Judge Dowling had been a member of the firm of Chadbourne, Stanchfield & Levy, and that this firm had at one time done some legal work for the Brooklyn-Manhattan Transit Company and the Interborough (see R. 24, fols. 71, 72; R. 72, 73, 74, fols. 215-220).

As to who shall be receiver of the Manhattan (which, so long as the lease to the Interborough continues, has practically no tangible property which would come into the possession of a receiver—in fact is, as Boehm states in her brief [p. 3], "a mere corporate shell")—there has been controversy, the clients of Mr. Franklin desiring, at the outset, the appointment of Mr. Amster as a *co-receiver* with Mr. Roberts (R. 567), and, later, the removal of Mr. Roberts on the charge that he, as President of Manhattan, had not been diligent, and on the further charge that he was not independent of Interborough influence and the appointment of Mr. Amster as *sole* receiver in his stead (R. 25, 26, fols. 75-77).

## The Issue.

*The sole and only question before the Court is whether Judge Manton's orders were void for want of jurisdiction.* The claims now advanced by the petitioners that there was impropriety in the appointment of receivers at the suit of a simple contract creditor on the consent of the defendant, that the suit was collusive, that it was brought for ulterior purposes and other like claims, are irrelevant to any question before the Court.

While counsel for Johnson endeavored to argue before Judge Woolsey the charge that the proceeding for the appointment of a receiver of the Interborough was a "collusive one," Judge Woolsey refused to hear argument on that point (R. 848, fol. 2543; R. 931, fol. 2793). The matter was not discussed in any way in Judge Woolsey's opinion. It was not argued before the Circuit Court of Appeals and was not considered in the opinion of the Circuit Court of Appeals and is not before this Court.

The petitioner did not, either in his bill of complaint, his petition for the orders to show cause, or in his argument before Judge Woolsey, or before the Circuit Court of Appeals, attack the orders appointing Receivers of the Interborough as being "consent decrees" based upon a bill of a "simple contract creditor." That question is not before this Court.

Even assuming that such matters were properly pleaded in the bill in the *Johnson* suit and that they could be raised in that suit, they certainly could not be decided without a trial on the facts and even in advance of answer.

The motions were made on the proceedings in the *Brake Shoe* suit, the *Barber* bill and the bill, the supplemental bill and petition in the *Johnson* suit before answer (R. 123, 124). Judge Woolsey decided the matter solely as a question of law. The vacating order adjudged that the orders in the *Brake Shoe* suit be "*vacated and set aside as wholly void and of no juridical effect*" (R. 725), this for the sole and only reason, as shown by the opinion, that the proceedings before Judge Manton "were not proceedings before a judge *de jure* or before a judge *de facto,* but were acts which involved usurpation of power which he had not and, consequently, were all *coram non judice* and wholly void and of no effect" (R. 720).

## SUMMARY OF ARGUMENT.


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## POINT I.

**Judge Manton was duly empowered to hold a District Court with all the rights, powers and duties of a District Judge.**

(a) *Historical background of designations of Circuit Judges to hold District Courts.*

When Chief Justice Marshall's power to hold a Circuit Court was challenged on the ground that, under the Constitution, the Justices of the Supreme Court had appellate jurisdiction only, except in the two cases where a State or a foreign minister was a party, this Court held that the challenge came too late, that practice and acquiescence had set the question at rest.

*Stuart* v. *Laird*, 1 Cranch. 299.

From that time until the business of the Supreme Court made it impractical, Circuit Justices held, and were required by statute to hold, at stated intervals, Circuit Courts.

When the Circuit Court of Appeals was created, the Chief Justice, the Associate Justice assigned to each Circuit, the Circuit Judges and the *District* Judges within each Circuit, were competent to sit as Judges of the Circuit Court of Appeals.

*Section 3 of the Act of March 3, 1891* (26 St. at L. 826, Sess. II, Chap. 517).

Thus the District Judges and the Circuit Judges exercised both appellate and original jurisdiction.

When the Circuit Courts were abolished upon the adoption of the Judicial Code in 1911, provision was made for the first time for the designation of Circuit Judges to hold District Courts. That provision must be construed in the light of its background. It undoubtedly was adopted because, among other reasons, the jurisdiction of the Circuit Courts, in which courts the Circuit Judges had exercised original jurisdiction, was transferred to the District Courts.

As originally passed in 1911, it read:

> "Sec. 18. Whenever, in the judgment of the senior circuit judge of the circuit in which the district lies, or of the circuit justice assigned to such circuit, or of the Chief Justice, the public interest shall require, the said judge, or associate justice, or Chief Justice, shall designate and appoint *any circuit judge* of the circuit to hold said district court" (Sec. 18, Judicial Code, Act of March 3, 1911).

The first sentence of said section, as revised in 1922, now reads:

> "The Chief Justice of the United States, or the circuit justice of any judicial circuit, or the senior circuit judge thereof, may, if the public interest requires, designate and assign *any circuit judge* of a judicial circuit to hold a district court within such circuit" (*United States Code*, Tit. 28, Sec. 22 [Judicial Code, Sec. 18]). (Italics are ours.)

Sections 17 to 21, Title 28, of the United States Code (Secs. 13 to 17 of the Judicial Code) provide for the designation of a *District* Judge of another district or circuit by the Chief Justice, the Circuit Justice or the Senior Circuit Judge, as the case may be, on account of the disability or the absence of a District Judge or the accumulation or urgency of business, and Sections 24 and 25, Title 28, of the United States Code (Secs. 20 and 21 of the Judicial Code) provide for similar designation in case of the disqualification or bias of a *District* Judge.

The provision of Section 22, Title 28, of the United States Code (Sec. 18 of the Judicial Code) for the designation of *Circuit* Judges is not thus limited. Plainly the purpose was to enable Circuit Judges to exercise original jurisdiction by holding District Courts, the same as they had previously done in the Circuit Courts, if the Chief Justice, the Circuit Justice or the Senior Circuit Judge considered it in the public interest for them to do so.

Thus the plain terms of Section 18 (of the Judicial Code) and the other sections in the context refute the assertion of petitioner Johnson that the sole public interest is "to prevent a congestion of business," and the quotations from the Con-

gressional Record on pages 27 to 29 of said petitioner's brief to support that assertion are inadequate and misleading.

The legislative history of Section 18 (of the Judicial Code) demonstrates that it was not intended to serve any such limited purpose, but that on the contrary its real purpose was to enable Circuit Judges to exercise original purisdiction in the District Courts, as they had theretofore done in the Circuit Courts, and especially to hear and determine particular cases of especial importance.

Section 18 of the Judicial Code as contained in the bill when first introduced in the House of Representatives in 1911 is identical with the section as finally enacted. The Congressional debate shows that certain Congressmen, notably Mr. Parsons of New York, one of the conferees for the House on the final passage of the bill, and Mr. Parker of New Jersey, who was then Chairman of the House Judiciary Committee, vigorously opposed any provision in the bill which would confine the Circuit Judges to appellate work.

Congressman Parsons offered an amendment to Section 116 of the Judicial Code as first read to the House to provide generally that the Circuit Judge should at all times have throughout his circuit the powers and jurisdiction of a District Judge, and he stated that the object of the amendment was to give the Circuit Judges the power that they then had. The Parsons amendment was agreed to by the House, sitting as a Committee of the Whole (Congressional Record, Vol. 46, Part 3, p. 2155). The House bill was sent to conference containing Section 18 as finally enacted and also the Parsons amendment giving Circuit Judges the powers and jurisdiction of the District Judge (Congressional Record, Vol. 46, Part 4, p. 3220). The conference report as read to the House shows that the Parsons amendment was stricken out during conference. The statement appended to the conference report contains the following as recorded on page 4001:

> "Section 118 (116). An amendment was made by the House as follows:
>
> "and, (the circuit judge) as well as the circuit justices, shall have throughout his circuit the powers and jurisdiction of a district judge.'

> The House conferees agreed to this being stricken out in view of the fact that provision for the assignment of circuit judges to sit in the district court when the exigencies of business require it was provided for by Section 18 of the act."

The striking out of the Parsons amendment was objected to by Mr. Parker (p. 4003), to whom Chairman Moon, Chairman of the Committee on Revision of Laws, replied (p. 4003):

> "In view of the fact that ample provision already existed in the bill for a circuit judge to sit as a district judge, that provision was found entirely unnecessary."

Further discussion of the Parsons amendment appears on page 4004, as follows:

> "Mr. Sherley (one of the House conferees): There was also an amendment undertaking to give to the circuit judges and justices of the Supreme Court the right to sit in district courts. As to the circuit judges, I think that right is retained in the bill although the Parsons amendment is not retained in it.
>
> Mr. Parker: How is it retained as to circuit judges?
>
> Mr. Sherley: Because at the time the amendment of the gentleman from New York (Mr. Parsons) was put on the bill, as was stated then, it was unnecessary, and simply repeating another provision in the law. The gentleman from New Jersey shakes his head, but that is not only my opinion, but that of all the conferees. As to the justices of the Supreme Court, we did not believe there was any actual need of their going into a district court, nor any possibility, considering the business of that court, of their going into a district court, and it was accordingly stricken out."

Mr. Parker, in asking that the conferees' report be disagreed to, stated at page 4006 (Congressional Record, Vol. 46, Part 4):

> "Does he (Mr. Moon) forget that in all the hundred districts of this land there are a hundred different judges, some of them weak and some of them strong, and that under the present law in great cases involving great issues, whether of trust matters or railroad

matters, the circuit court may be presided over by circuit judges who can go to those cases and can hear those cases, whereas it is now provided that no one except in the case of the disability of the district, can go into that district?

Mr. Moon of Pennsylvania: Oh, no.

Mr. Parker: Show me that section.

Mr. Moon of Pennsylvania: It provides for that when the public interests require."

In the Senate, the Congressional Record shows that when Section 18 of the Judicial Code was first read to the Senate, Senator Heyburn, in charge of the bill and one of the conferees for the Senate on the final passage of the bill, said:

> "Mr. Heyburn: I will say, in connection with this section, that it is a new provision, but one that is rendered necessary by reason of the consolidation of these courts, and it is in entire conformity with the existing practice" (Congressional Record, Vol. 45, Part 4, p. 3547).

Also see Senator Heyburn's remarks on pages 3999 and 4000 of Congressional Record, Vol. 45, Part 4.

Senator Sutherland, at the time a member of the Special Joint Committee on the Revision of the Laws and also of the Judiciary Committee and also one of the conferees for the Senate on the final passage of the bill, makes it clear that the fears expressed by Senator Bacon of Georgia, that the Circuit Judges would not be permitted to sit in the District Court, were unfounded. Senator Sutherland stated (Congressional Record, Vol. 46, Part 1, p. 840):

> "Mr. Sutherland: Mr. President, I think when we come to consider this bill, the Senator from Georgia will find that these protests are being made under a misapprehension as to precisely what the bill does provide. I think the misapprehension consists in the belief that the circuit judges will be prevented from hereafter sitting upon the trial bench. The bill does not undertake to do that at all. The bill simply consolidates the original jurisdiction in a court to be called the district court. For myself I can see no earthly reason why we should have two courts of orig-

> inal jurisdiction; but we have provided in the bill, with the utmost flexibility, for the circuit judges sitting in the district court as trial judges. I think, when we come to consider the bill, the Senator from Georgia will find that these protests are made under that misapprehension."

Consideration of the bill was concluded on February 8, 1911. At that time Senator Sutherland, in discussing Senator Root's motion to strike out the section which consolidated the Circuit and District Courts, stated as follows (Congressional Record, Vol. 46, Part 3, p. 2138):

> "This bill, however, does not destroy the flexibility which exists under the present law. The circuit judge may still go to the district court and hold court, only he will hold as a circuit judge presiding over the district court.
>
> The flexibility, however, of the whole system which permits an interchange of judges is not in any manner affected by this change in the law while we are getting rid of the conditions of which I have spoken, which are immensely expensive to the Government."

Speaking against the same motion, Senator Clarke of Arkansas, also a member of the Special Joint Committee on Revision of the Laws and one of the Senate conferees, stated (p. 2138):

> "It (the proposed consolidation) will assign to their appellate functions the judges of the circuit court, and it will reserve their right to appear upon the district bench, just as it reserves in favor of the judges of the Supreme Court of the United States whenever an occasion of sufficient importance seems to make it necessary, the right to sit in the circuit court."

Following this discussion, the Root motion was rejected and the bill was passed. The Senate bill was then rejected by the House and was sent to conference. The conference report was finally approved by the Senate (Congressional Record, Vol. 46, Part 4, p. 3853) with Sections 18 and 23 intact as originally read.

That it was contemplated and intended that Section 18 would be resorted to when important cases arose also is shown by the following colloquy between Congressman Bartlett of Georgia and Chairman Moon of the House Committee on Revision of the Laws:

> "Mr. Bartlett of Georgia: * * * But you have, as I understand it, in this amendment to the law, in section 18, which is new, made a provision by which a circuit judge can be required to go and preside in important cases whenever, in the judgment of the senior circuit judge, it is found necessary to assign a circuit judge to the district court?
>
> Mr. Moon of Pennsylvania: That is true; in order that this bill shall not require the creation of any additional judges and that the present judicial force of the country shall administer the business just as it does now.
>
> Mr. Bartlett of Georgia: So that the cases will be more frequently tried in the district court by circuit judges than in many instances they are tried now?
>
> Mr. Moon of Pennsylvania: Fully as frequently anyhow" (Congressional Record, Vol. 46, Part 1, p. 302).

Since the adoption of the Judicial Code in 1911, *every* Senior Circuit Judge in the Second Circuit, beginning with Judge Lacombe and followed by Judges Ward, Hough, Rogers and Manton (R. 553), has designated himself to hold District Courts, sometimes to hear a particular case (R. 655-661; and see *Penn. Steel Co.* v. *New York City Ry. Co.*, 221 Fed. 440). That power has been continuously exercised by the Senior Circuit Judges of other circuits, both generally and to hear and determine specific cases (R. 555, 662; and see *United States* v. *Gill*, 292 Fed. 136).

The Northern District of Illinois is more nearly comparable with the Southern District of New York than any other. The Senior Circuit Judge regularly designates himself and all the other Circuit Judges to hold District Courts in that district (R. 555).

With the knowledge of that practice, the Congress in 1922 re-enacted said Section 18 in more precise language and added

a provision expressly conferring on a judge so designated all the powers, rights and duties of a district judge, save for the specified exceptions. The omission of the clause containing the phrase "in his judgment" can have no significance since necessarily the one having the power to designate must, in the exercise of his judgment, determine the fact of public interest, and the obvious purpose of the revisers was to simplify the section without change of meaning.

Obviously the public interest might and often has required such designations for particular business; and in districts like the Southern District of New York and the Northern District of Illinois there are obvious reasons why the resident Circuit Judges should have standing designations so as to be available to suitors at all times. Wherefore, in accordance with the practice followed in the Second Circuit since 1911 (R. 554), Circuit Judges, resident in the Southern District of New York, Judge Augustus N. Hand, Judge Learned Hand and Judge Manton, have standing designations to hold District Courts in that district.

In addition to the standing designation of Senior Circuit Judge Manton to hold a District Court made on March 20, 1930, as aforesaid (R. 661), he also designated himself to hold a District Court and particularly to hear and determine all applications and proceedings in the *Brake Shoe* case on August 25, 1932 (R. 177).

*District* Judges of other districts or circuits can be designated only for specific reasons, i. e., on account of the accumulation or urgency of business, the disability, absence, disqualification or bias of a District Judge. *Circuit* Judges, however, are to be designated "if the public interest requires" it. Such public interest, for reasons other than those specified for the designation of District Judges, will ordinarily relate either to the particular business to be done or to conditions peculiar to a district like the Southern District of New York.

(b) *The existence of public interest justifying the designation cannot be inquired into.*

The statute does not require evidence of the fact of public interest to be presented to the judge making the designation. Necessarily he determines that from his own knowledge of the conditions in his circuit, charged as he is by the statute with supervisory authority. The designations of March 20, 1930 (R. 708) and of August 25, 1932 (R. 177) both recite the requirement of the public interest, but neither recital purports to be based on any evidence presented to the judge.

The record does *not* "affirmatively" show "what the alleged public interest was," nor does it state the "evidence" of such interest as is stated in Point II of petitioner Johnson's brief (p. 21).

The affidavit of Mr. Quackenbush (R. 175) referred to by both petitioners says nothing about the public interest. It merely shows the importance of appointing individual receivers, which is so obvious that petitioner Boehm says "it is inconceivable that a district judge would not have recognized" it (Boehm brief, p. 33).

Petitioner Boehm makes the remarkable suggestion that instead of applying to Judge Manton the parties to the *Brake Shoe* suit should have applied to a judge of the Eastern District of New York, into which the Interborough lines extend and where "trust companies are not appointed either in equity or bankruptcy," if they desired to avoid the appointment of a trust company (Boehm brief, p. 33).

The record discloses that the *Brake Shoe* bill was filed in the Eastern District of New York and that the same receivers were there appointed by Judge Campbell (R. 583), a cogent reason for not now creating chaos and confusion by attempting to appoint other receivers in the Southern District in another suit, and an equally cogent reason why the petitioners' objections, if they have any, should have been made in the *Brake Shoe* suit.

Petitioner Boehm concedes "that the exercise of the power conferred upon the senior circuit judge is ordinarily conclusive and may not be challenged at *any* time and in *any* proceeding where his order of designation may be involved," but claims that that conceded rule does not apply "where it clearly and fully appears that the senior circuit judge has acted upon grounds unauthorized by the statute" (Boehm brief, p. 29). To support that statement she refers to the opinion of Judge Manton, which is not in the record, which was not before Judge Woolsey and was not even written until after Judge Woolsey's decision. That opinion, if the Court sees fit to refer to it, disproves the statement that the Senior Circuit Judge acted upon grounds unauthorized by the statute (1 Fed. Supp. 820).

Said petitioner concedes that the objection must be "*timely*" and made "at the beginning" of the case. Obviously, if lack of public interest goes to the jurisdiction of the Court, timeliness is of no consequence, and it can be inquired into. The position taken is tantamount to a concession that lack of public interest is not jurisdictional. If it is not jurisdictional, it, of course, cannot be inquired into.

Whilst we are not concerned on this appeal with the reasons for Judge Manton's conclusion that the public interest required his designation, both generally to hold a district court and specifically to hear the *Brake Shoe* case, which conclusion is not reviewable, the petitioners themselves demonstrate that the case was one of unusual importance and public interest. Petitioner Boehm refers to it in her brief as "a receivership involving so great a public interest" (p. 33), and as a case of "great economic, social and even political significance" (p. 15).

Boehm, in her brief, even asserts that public interest attaches to the question of the appointment of individuals as Receivers for such a company as the Interborough. In pointing out that the District Judges had not adopted a practice of uniformly appointing the Irving Trust Company as re-

ceiver in equity cases, though they do so in bankruptcy cases, Boehm says, page 45:

> "In equity cases the District Judges have not taken so drastic a step—influenced perhaps to some extent by the opinions similar to that of Judge Manton that some equity receiverships require, in the *public interest*, that individuals be appointed." (Italics ours.)

Johnson, in his supplemental bill of complaint, paragraph VIII (R. 56, fol. 168), after setting out at length some of the issues in the Interborough Receivership which he says are "bound to arise and will require judicial determination" (such as important questions arising under the Manhattan lease), goes on to say:

> "The foregoing are not idle or moot questions stated for the purpose of alarming the court. They are vital questions affecting the future of both companies * * *. The amounts involved on each issue will probably run into many millions of dollars. The *public interest* is seriously involved in most, if not all of the issues raised." (Italics ours.)

As to what is embraced within the phrase "public interest," see

> *Lawrason* v. *Swartz*, 132 La. 511, 61 So. Rep. 554 (1913).

It was, then, peculiarly the kind of case for a circuit judge, and certainly for the senior circuit judge to take jurisdiction of, if he thought he could spare the time from his other duties, and that was for him alone to decide. It was peculiarly the kind of case which the district judges, with the burden of their congested calendars, would naturally be glad to be relieved of. It was peculiarly the kind of case which the Congress thought circuit judges would be designated to hear when in 1911 it preserved the existing flexibility of the judicial system and the interchangeability of judges between appellate courts and courts of original jurisdiction, and pro-

vided for the exercise of original jurisdiction by circuit judges in the district courts, the same as they had theretofore exercised such jurisdiction in the circuit courts.

In any case, the sole responsibility and duty is upon the one having the power to designate. The decision as to the public interest is vested in him. He acts administratively. If his decision be the subject of review or collateral attack, no litigant could safely submit any business to a designated Judge.

In *Ex parte American Steel Barrel Co.*, 230 U. S. 35, application was made for a writ of mandamus to command Judge Chatfield, District Judge of the United States for the Eastern District of New York, to resume jurisdiction and proceed to hear and determine the matters in the case of "In re Ironclad Manufacturing Company." During the course of the proceeding of this case before Judge Chatfield, an affidavit of bias was filed. Whereupon, Judge Chatfield, pursuant to the provisions of Section 25, Title 28, of the United States Code, certified the situation to Judge Henry E. Lacombe, Senior Circuit Judge for the Second Circuit, who thereupon, pursuant to the provisions of Sections 25 and 17, Title 28, of the United States Code, designated Judge Mayer of the Eastern District to hear the case. The contention in the mandamus proceeding was that Judge Chatfield was not disqualified and that accordingly a designation of Judge Mayer was improper and Judge Mayer was entirely without jurisdiction to proceed, but that the matter should continue before Judge Chatfield.

The Court took the view that even if Senior Circuit Judge Lacombe had not acted strictly in pursuance of the authority conferred on him by statute, if he had "made a mistake," nevertheless his action was not subject to review. The Court said (230 U. S. 45, 46):

> "Judge Lacombe was clearly called upon to determine in the exercise of his jurisdiction as the Senior Circuit Judge, whether the situation was one in which he should designate a Judge in the room and place of

> Judge Chatfield. He determined the matter adversely to the petitioners. If in this he made a mistake, it was one made in the course of the exercise of his legitimate jurisdiction under sec. 14 of the new Judicial Code, and we cannot compel him through a writ of mandamus to undo what has thus been done."

A statute of New York State authorizes the Governor to appoint an extraordinary term of the Supreme Court, designating the Justice to hold it "whenever in his opinion the public interest so requires." A designation by the Governor under that statute of a Justice to hear and determine motions for new trials in specific actions, and, if granted, to try them, was held by the Court of Appeals of New York to be beyond the province of the courts to inquire into.

> *People ex rel. S. L. & T. Co.* v. *Supreme Court*, 220 N. Y. 487.

*People* v. *Ballard*, 134 N. Y. 269, had to do with an action brought in the name of the People of the State of New York by the Attorney General to remove the directors of a domestic business corporation from their positions for misconduct and to compel them to account. The statute provided that the action might be brought by the Attorney General "if, in his opinion, the public interests required that an action should be brought." The Court held (134 N. Y. 293):

> "* * * the question as to what the public interests require is committed to the absolute discretion of the attorney-general, and it cannot be made the subject of inquiry by the courts. If he abuses the great power intrusted to him, a remedy may be found in his removal from office, or in the election of a successor worthy of the high position."

(c) *The designation could not be attacked collaterally for want of public interest.*

Judge Woolsey properly denied the appellants' motions in so far as they attacked the designation order and the appellants have not sought to obtain a review of such denial.

If a collateral attack could be made on that ground even in the very suit in which jurisdiction was exercised, chaos and uncertainty would result; and if permitted in a collateral suit, no judgment or decree made by a designated Judge would ever have finality; and a Judge of the District Court would be given the power to determine the validity of a designation—a power certainly not contemplated by any provision of the Judicial Code.

(d) *It is inconceivable that the fact of public interest can be inquired into, but, in any event, inquiry must necessarily be made in some procedure adequate for the purpose.*

In so important a matter as the determination that a Senior Circuit Judge, who is actually holding a District Court under a designation, was acting as an usurper because of a lack of public interest sufficient to warrant his designation—certainly the determination of lack of public interest should not be reached in any casual manner or on the basis of unsupported allegations or without some opportunity for the parties vitally interested in the determination, including the designating Judge, to make some proof of the facts in the situation. This would seem to be obvious and fundamental.

Yet this Court is asked to reach this determination on a record which contains no basis whatsoever for such a determination. The bill of Johnson alleges that there was "no question of public interest involved" (R. 55), and the bills of Johnson and Boehm contain identical allegations that the Designation Order was "irregular, improper, without legal warrant or justification, and void" (R. 103, 121). See also (R. 97).

These allegations of conclusions are all made in conjunction with allegations which show that the conclusions were

based upon contentions that the Designation Order was a violation of Rules 1-a and 11-a, and not that they were void for lack of public interest to justify the making thereof. These unproven allegations constitute the *only* basis in the record for any finding of lack of public interest.

Without anything more in the record than these unsupported allegations by way of conclusions, without any proof to sustain them, without any issue taken thereon, without any trial of that issue, the petitioners now ask this Court to determine as a fact that there was no public interest to justify the Designation Order. While it is inconceivable that the fact of public interest may be inquired into, we submit that if the fact of public interest is open to investigation, either directly or collaterally, there must be some procedure involving a trial of the issue, and that an essential part of that procedure would involve an examination of the designating Judge (be he Chief Justice of the United States, or the Circuit Justice, or the Senior Circuit Judge) as to the public interest upon which he relied in making the designation.

*People* v. *Ballard*, 134 N. Y. 269, referred to at page 30, *supra*, is in point. It held that in a case in which the Attorney General of the State of New York was to act "if the public interest requires" the fact of public interest was not an issuable fact, saying (134 N. Y. 293):

> "If it were held otherwise, upon what evidence could the court proceed?"

The Court shows that if the question could be examined into, an intolerable multiplication of issues would be produced and that they could not be easily defined by pleadings and unless so defined could not be tried (134 N. Y. 293).

(e) *Designations of Circuit Judges to sit in a particular case are proper.*

We have already pointed out that the making of designations for the trial of a particular case or a class of cases has been a uniform practice (R. 554, 555, 655, 659, 660, 661,

662). The right to do so was approved in *United States* v. *Gill*, 292 Fed. 136 (C. C. A., 4th). The right to do so was in the mind of Congress in 1911 in enacting Section 22 (see pp. 21, 22, *supra*). See *State* v. *Leib*, 17 N. M. 270, 125 Pac. 601, 602 (1912).

Section 23, Title 28, of the United States Code provides, among other things, that—

> "It shall be the duty of the district or circuit judge who is designated and appointed under either of sections 17 to 22 of this title, to discharge all the judicial duties *for which he is so appointed,* during the time for which he is so appointed; * * *." (Italics ours.)

thereby expressly contemplating that the designation may have been for particular duties and for a limited time.

Apart from the reasons for *standing* designations in a district like the Southern District of New York, and apart from the reasons specified by the statute for the designation of District Judges of other districts or circuits, the public interest requiring a designation will necessarily relate to some particular business of the Court. It was manifestly the intention of the Congress to confer the power on the Chief Justice, the Circuit Justice or the Senior Circuit Judge to designate Circuit Judges to hear and determine particular matters deemed of special importance. The contrast between said Section 22, governing the designation of Circuit Judges, and Sections 17, 19, 20, 24 and 25, governing the designation of District Judges, puts that beyond doubt or debate.

(f) *The uniform and general practice since the adoption of the Judicial Code in 1911, of the Senior Circuit Judges in designating themselves and in making both general standing designations and designations for a particular case, should put the question at rest.*

*Stuart* v. *Laird*, 1 Cranch. 299.

The universal practical construction for so long a time should be conclusive.

*United States* v. *Hermanos y Compania,* 209 U. S. 337, 339.

*Robertson* v. *Downing,* 127 U. S. 607, 613.

*United States* v. *G. Falk & Brother,* 204 U. S. 143, 152.

The legislative history of the revision of 1922 is of great significance.

The bill originated in the House. By Section 6 of the House bill, Section 18 of the Judicial Code was rephrased, as stated *supra* (pp. 24, 25), so as to express the same thought in simpler and fewer words.

When the bill came to be reported by the Senate Judiciary Committee to the Senate, Sections 13 to 18 of the Judicial Code had been completely recast. Section 13, as so recast, provided for the designation of District Judges by the Senior Circuit Judge (a) on account of the disability or absence of the District Judge, (b) "in aid of a District Judge" on account of the accumulation or urgency of business, and (c) "in aid of a District Judge when the public interests so require"; and Section 14 was amended to read as follows:

> "(1) A circuit judge may be designated to act as district judge in any district of his circuit or of attached territory in any case where a district judge might be so designated.
>
> (2) Such designation may be made by the senior circuit judge (who may designate himself) whenever he is satisfied that the occasion therefor exists and that the public interests so require" (*Congressional Record,* Vol. 62, Part 3, p. 2584).

In reading the bill as reported to the Senate, Senator Cummins, Chairman of the Judiciary Committee, explained that Section 14 thereof, just above quoted, did not differ essentially from the present law, and with reference to subdivision (2) thereof he said:

> "That is simply a better and more complete expression of the thought of the existing law" (*Congressional Record,* Vol. 62, Part 5, p. 4852).

The statute then provided (Judicial Code, Sec. 18) and now provides (Sec. 22, of Title 28, of United States Code) for the designation by the Chief Justice, the circuit justice or *the senior circuit judge* of *"any circuit judge"* of the circuit. The words "any circuit judge" are all-inclusive and necessarily include the senior circuit judge.

Some of the Senators thought the power of designation subject to abuse. Others objected to the provisions for annual conventions to be called by the Chief Justice; and various amendments were proposed, but all of the proposed amendments to the bill as reported by the Judiciary Committee were rejected (*Congressional Record,* Vol. 62, Part 5, pp. 5166-5174) and the bill as reported by the Judiciary Committee was passed by the Senate (*id.,* p. 5174).

The Conference Committee reported a bill which, in general, followed the original House bill rather than the recast of it made by the Senate Judiciary Committee, and the bill so reported became a law. The first sentence of Section 18 of the Judicial Code, as finally amended (now Sec. 22, of Title 28, of the United States Code), is the same as said Section 18 in the original House bill, with the following provisions added:

(1) The provision for the designation by the Chief Justice of Judges of the United States Court of Customs Appeals for service in the Supreme Court of the District of Columbia or the Court of Appeals for the District when requested by the Chief Justice of either of said courts;

(2) The provision that designated Judges "shall have all the powers and rights and perform all of the duties of a judge of a district or a justice of the court to which he has been assigned," save for the exceptions noted, and that in case of an unfinished trial before the expiration of the period of service, such period shall be deemed extended until the trial is concluded; and

(3) The provision empowering a designated Judge, despite his absence from the district and the expiration of the time limit in his designation, to decide all matters submitted to him, to decide motions for new trials, settle bills of exception, and the like (*Congressional Record*, Vol. 62, Part 9, p. 9497).

The substantial re-enactment of said Section 18 of the Judicial Code, with the addition of the provision giving a designated Judge all of the rights and powers and duties of a District Judge, save for the exceptions, and the rejection of all amendments limiting the power of designation, sets at rest any possible question as to the regularity of the well known practice of Senior Circuit Judges to designate themselves, both generally and to hear and determine specific matters.

Such re-enactment was a confirmation by the Congress of the practice that had prevailed since the adoption of the Judicial Code and was an adoption of that construction of said Section 18 of the Judicial Code by the Congress itself (Sec. 22, of Title 28, of the United States Code), which should now be conclusive.

*U. S.* v. *G. Falk & Brother,* 204 U. S. 143, 152.
*Copper Queen Mining Co.* v. *Arizona Board,* 206 U. S. 474, 479.
*U. S.* v. *Hermanos y Compania,* 209 U. S. 337, 339.
*Heald* v. *District of Columbia,* 254 U. S. 20, 23; 65 L. Ed. 106, and exhaustive note citing cases.
*Brewster* v. *Gage,* 280 U. S. 327, 337.
*McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492, 493.
*Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 557.

(g) *As a properly designated Judge either under his standing designation of March 20, 1930, or under his designation of August 25, 1932, Judge Manton had all the rights, powers and duties of a District Judge.*

It is expressly so provided by statute. By Section 23, of Title 28 of the United States Code (Sec. 19 of the Judicial Code), a judge so designated is commanded "to discharge all the judicial duties for which he is so appointed," thus plainly contemplating designation for particular duties, i. e., particular cases, "and all the acts and proceedings in the courts *held by him, or by or before him* * * * shall have the same effect and validity as if done by or before the district judge of the said district."

And Section 22, Title 28, of the United States Code (Sec. 18 of the Judicial Code) provides that a judge so designated "shall have all the powers, and rights, and perform all the duties, of a judge of the district * * * (excepting the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds)." The exceptions emphasize the inclusion of all other powers.

This Court said in *Ex parte United States*, 226 U. S. 420, 423, 424:

> "It is moreover beyond question that the statute while contemplating as a general rule the holding of District Courts by district judges and as a general rule for holding Circuit Courts of Appeal by circuit judges, nevertheless expressly directs when the occasion requires (Sec. 18) the assignment by the senior judge, or the circuit justice, or the Chief Justice of a circuit judge to hold a District Court and endows a judge so assigned with all the authority of a district judge (Sec. 19), giving power in case of such designation to hold separately at the same time a District Court in such district, and to discharge all the judicial duties of the district judge therein (Sec. 14). The statute therefore clearly gives to the circuit judges the rights and powers of judges of the new District Courts, and calls such powers into play when assigned according to law."

## POINT II.

**The District Judges were without power to deprive designated Judges, whether Circuit Judges or District Judges, of the authority and jurisdiction vested in them by the statute.**

The concurrence of District Judges in designations is not required, though the concurrence of a majority of the Circuit Judges in rules of the District Court regulating the practice in suits in equity is required by Equity Rule 79.

Judges designated to hold a District Court are neither outsiders nor intruders in the district, as Judge Woolsey seemed to suppose. They are expressly required by statute without their consent to accept such assignment and are expressly given all of the powers and rights and are commanded to perform all the duties of a Judge of the district, save for the specified exceptions (Sec. 22, Title 28, United States Code; Sec. 18, Judicial Code), and by Section 23, they are commanded to perform all the judicial duties for which they are appointed during the time for which they are so appointed. Yet under Rule 1-a adopted by the District Judges they can do no "work" at all except "such work" as may be assigned by the Senior District Judge. Although, in the opinion of the Chief Justice, a Circuit Justice or the Senior Circuit Judge, the public interest may require the designation of a Circuit Judge to hold a District Court, the Judge so designated must, under said rule, get the consent of the Senior District Judge before he can do any "work" in the Court which he is designated to hold, and without such consent he is an "outsider," an "intruder" and, if he does do any work, an "usurper."

Section 13, Title 28, of the United States Code (Sec. 9 of the Judicial Code) provides:

> "SEC. 13. *Courts open as courts of admiralty and equity.* The district courts, as courts of admiralty and as courts of equity, shall be deemed always open for

> the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. *Any district judge* may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court." (Italics ours.)

Federal Equity Rule No. 1 similarly provides. Federal Equity Rule No. 6 provides:

> "Each District Court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes. * * *"

The manifest intention of said statute and rules was to insure to suitors accessibility to the Courts at all times and places. The Court is not a place; the Judge constitutes the Court, and he is commanded by the statute to keep his Court "*always open*" for the purpose, among others, of making interlocutory orders and under said Equity Rule No. 6 he may make such orders "at any time and place."

As was said by Judge Hough in *Ackerson* v. *United States*, 15 Fed. (2nd) 268 (C. C. A., 2nd, 1926), at 270:

> "The power of suspension (of a sentence) is lodged in the court, and any acting judge constitutes the District Court."

That the orders in the *Brake Shoe* suit set aside by Judge Woolsey were interlocutory admits of no doubt. See *Horn* v. *Pere Marquette*, 151 Fed. 626 (C. C., E. D. Mich., S. D. 1907, opinion by Judge Lurton).

The appointment of receivers is usually emergency business. The suitor has the right to apply to the Judge wherever he can find him. But although a designated Judge is given all the rights, powers and duties of a District Judge, if a suitor applies to him, no matter how great the emergency, under the District Judges' Rule 1-a, the designated Judge (in this case the Senior Circuit Judge) must seek out the Senior District Judge and get the latter's consent to his doing "such work" before he can act; and under Rule 11-a, whether he be a designated Judge or a District Judge, he cannot act on an application for the appointment of receivers unless "assigned to hold the bankruptcy and motion part." The Judge so assigned may not be available. He may be disqualified. [Indeed the records of the District Court disclose that when a motion was later made in the *Johnson* suit before Judge Patterson, the Judge assigned to hold the bankruptcy and motion part on August 26, 1932, he stated that he considered himself disqualified by reason of the fact that the firm of which he was a member when he went on the bench had been counsel for the Manhattan Railway.] Still, no matter how urgent, the business must wait until all the Judges can make another assignment, if said Rule 11-a have the effect ascribed to it by Judge Woolsey, or until the designation of another Judge by the Senior Circuit Judge under Section 24, and even such Judge, though specially designated because of the disqualification of the Judge holding the motion part, would still have to secure an assignment to that part and the consent of the Senior *District* Judge before he could act, if said rules have the effect claimed. Manifestly that would defeat the very purpose of said Section 13 of the United States Code and of Equity Rules 1 and 6 and the express provisions of said Sections 22 and 23.

No rule can "enlarge or restrict jurisdiction" or "abrogate or modify substantive law."

*Washington-Southern Co.* v. *Baltimore Co.*, 263 U. S. 629, 635.

*Hudson* v. *Parker*, 156 U. S. 277.

*Davidson Marble Co.* v. *Gibson*, 213 U. S. 10.
*General Electric Co.* v. *Marvel Co.*, 287 U. S. 430, 434.
*Venner* v. *Great Northern Railway*, 209 U. S. 24, 35.

Designated Judges, whether Circuit Judges or District Judges of other districts, derive their power and authority from the statute. No District Judge or group of Judges can by so-called rules restrict or take away the jurisdiction so conferred. They cannot by rule or otherwise make a Judge designated under the statute by the Chief Justice, a Circuit Justice or the Senior Circuit Judge, an "usurper" or an "intruder" in their "house," nor can they thus deprive him of the jurisdiction conferred on him by statute, much less of his title to office.

Petitioner Boehm's main contention appears to be that regardless of whether the questions argued have been properly raised, and regardless of the vast interests involved in the litigation, the Supreme Court should undertake to exercise a supervisory power over a disagreement between the senior circuit judge and the district judges in matters of administration (Boehm brief, Points I and II)

It undoubtedly is the fact, and indeed it is apparent on their face, that Rules 1-a and 11-a were adopted for the very purpose of preventing the exercise of jurisdiction by a circuit judge designated under said Section 22. If that was their purpose, as the petitioners themselves appear to suggest, they are plainly invalid. There is no warrant whatever in the statute for the exercise of such authority. The district judges are given no voice in the designation of circuit judges to hold district courts, not even so much as to make recommendations or requests, though of course a proper request would be heeded by the designating authority.

A rule of the district judges that a designated judge should not hear applications for the appointment of receivers would plainly be an unlawful attempt to limit or restrict jurisdiction conferred by the statute. The like cannot be done by indirection.

If the said rules are to be considered as an arrangement for their convenience, among judges exercising co-ordinate jurisdiction, as mere "calendar" rules, they are entirely innocuous as far as any question now before the court is concerned. They would not deprive even the judges who signed them of jurisdiction. They certainly would not be permitted to prejudice the rights of litigants.

## POINT III.

### So-called Rules 1-a and 11-a adopted by the District Judges are invalid.

For convenience we repeat them:

> "1-a. Any judge designated to sit in the District Court for the Southern District of New York, shall do such work only as may be assigned to him by the senior district judge."
>
> "11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy Rules) shall be made to the judge assigned to hold the Bankruptcy and Motion Part of the business of the court *and to no other judge.*" (Italics ours.)

Rule 1-a frankly restricts the power of designated Judges only. It does not apply to the regularly appointed District Judges. The designated Judges may do "such work only" as may be assigned them by the Senior District Judge.

Rule 11-a restricts the jurisdiction of all, whether District Judges or designated Judges. But both rules are of a piece.

The power of the District Court to make rules is to be found in Section 731, Title 28 of the United States Code.

Section 731 provides:

> "*Rules of practice in district courts.* The district courts may, from time to time, and in any manner not

inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under Section 730 of this title, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

(a) *Rules 1-a and 11-a were not adopted in accordance with the requirements of the statutes.*

If they are rules of practice at all, then, in so far as they affect the *practice in equity suits,* they are necessarily rules of practice in equity. Rule 11-a in express words applies to "the appointment of receivers in equity causes."

In that view they required the concurrence of a majority of the Circuit Judges.

*Section 730, Title 28, United States Code.*
*Federal Equity Rule No. 79.*

They do not purport to have had such concurrence (R. 16) and in fact they did not have it (R. 554 fols. 1662, 1663). Although that is undenied, petitioner Boehm says that a majority of the circuit judges may "verbally or by tacit acquiescence" have concurred (Boehm brief, p. 43). That emphasizes the character of said rules. The rights of litigants certainly cannot be affected by rules dependent upon verbal or tacit acquiescence of judges.

To get around the necessity of the concurrence of a majority of the Circuit Judges, Judge Woolsey minimized Rule 11-a to a mere direction to litigants, a signpost pointing "to the door of the room" where particular business could be done (R. 714, fol. 2140); but for the purpose of depriving Judge Manton of jurisdiction and even of his status as a Judge, Judge Woolsey magnified it into a rule of substantive law, with the consequence that a suitor who should submit his business to a Judge sitting behind the wrong door, but otherwise of competent jurisdiction, would later find to his sorrow

that the acts relied on were *coram non judice* and subject to collateral attack, because not done by a Judge at all but only by an individual without even the color of authority, a mere "usurper."

It matters little which horn of the dilemma be chosen. If the rule is a mere signpost, it is not a rule of practice at all and said Section 731 furnishes no warrant for it. If it is a rule of such plenitude of power as to deprive a Judge acting contrary to it even of his status as a Judge, it certainly cannot affect proceedings in equity unless it have the concurrence of a majority of the Circuit Judges.

We confess our inability to follow Judge Woolsey's reasoning that "practice in equity receivership cases only commences after the making of the order of appointment" (R. 714, fol. 2141). We had supposed that filing the bill was ordinarily the first step in the practice in an equity case, the same as in any other case. That gave the Court jurisdiction, and Judge Woolsey holds that the District Court still has jurisdiction of the *Brake Shoe* suit solely by reason of the filing of the bill, even after all the interlocutory orders have been vacated (R. 720).

*Nor considered merely as "general" rules* were they adopted in accordance with the requirements of Section 731. The statute gives power to make rules to the "District *Courts,*" and not to the Judges thereof or any number of such Judges. The records of the Court show that when these rules were adopted by the eight regularly appointed Judges of the Southern District of New York, Circuit Judge Julian W. Mack was holding a District Court for the Southern District of New York pursuant to designation of the Chief Justice, dated November 11, 1930, made under Section 201 of the Judicial Code (U. S. Code, Title 28, Sec. 214), that Circuit Judge Manton was holding a District Court for the Southern District of New York pursuant to standing designation and actually sitting in certain matters, that Circuit Judges Learned Hand and Augustus Hand had standing designations to hold a District Court for the Southern District of New York, and that United States District Judge William I. Grubb was holding a District Court in the South-

ern District pursuant to designation of the Chief Justice. Although these five designated Judges had "*all* the powers" of a District Judge "save only the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds," there is no pretense that any of them or any of the Circuit Judges for the Circuit, let alone a majority of them, were so much as consulted in the making of the rules (R. 694, 714).

Empowered to hold District Courts, with all the rights, duties and powers of the District Judges, they necessarily had, perforce of the express provisions of said Section 731, the power and right to make rules governing the practice in their courts.

(b) *The so-called rules are not rules of practice.*

Plainly Rule 1-a restricting the jurisdiction of a designated Judge so that he may do "such work only" as the Senior District Judge permits is not a rule of practice. The Senior District Judge has nothing to say about the designation of Circuit Judges to hold District Courts. Whether such designation shall be made is solely for the Chief Justice, the Circuit Justice or the Senior Circuit Judge to determine.

Neither the Senior District Judge, nor all of the District Judges together, are given any power to say what "work" a designated Judge may do or whether he shall be permitted to do any work at all, and they cannot confer such power upon themselves by passing a so-called rule and calling it a rule of practice.

Nor is Rule 11-a in any true sense a rule regulating the practice concerning "the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default * * * matters in vacation" (Sec. 73 of Title 28 of the United States Code) or "the practice, proceedings and process, *mesne* and final" (Federal Equity Rule 79), or the like.

It does not even point to the door of the room where particular business can be transacted, as Judge Woolsey sup-

posed. It merely points to the Judge "assigned" to hold a particular part. That Judge and he alone is to keep his Court "always open" for the purpose of entertaining applications for interlocutory orders appointing receivers in equity. That Judge and he alone is to make "at chambers or in the clerk's office, and in vacation as well as in term," interlocutory orders appointing receivers in equity, although the statute says "*any district judge* may, upon reasonable notice to the parties, make, direct and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court." (Italics ours.)

Rules which purport to give the Senior District Judge power to tell a designated Judge what "work" he can do, and which forbid all the Judges except one to exercise the jurisdiction conferred upon them by the statute, are not rules of practice. They are attempts to restrict the jurisdiction conferred by statute on designated Judges and District Judges as well.

(c) *The two rules do not meet the requirement of Section 731 that they be "not inconsistent with any law of the United States or with any rule prescribed by the Supreme Court under Section 730."*

They are clearly inconsistent with the plain statutory provisions of Sections 22 and 23, Title 28, of the United States Code considered under Point I above, depriving the designated Judges of the broad powers and interfering with their performance of the broad duties imposed upon them by those statutes. These rules are also clearly inconsistent with the plain statutory provisions of Section 13 of Title 28, considered under the preceding Point II above. They are also plainly inconsistent with Federal Equity Rules Nos. 1 and 6; Equity Rule No. 1 being practically a copy of Section 13.

Federal Equity Rule 6 provides:

> "* * * but the judge may *at any time and place*, and on such notice, if any, as he may consider reason-

> able, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes." (Italics ours.)

Rule 1-a in effect says that Equity Rule 6 shall not apply to a designated Judge except upon assignment from the Senior District Judge, and Rule 11-a says that Equity Rule 6 shall not apply to any Judge of the District Court whether regularly appointed or designated, in so far as the interlocutory order sought has to do with the appointment of a receiver.

Rules 1-a and 11-a are also inconsistent with Sections 17, 18 and 28, Title 28, of the United States Code.

Rule 1-a is also inconsistent with Sections 375, 376, 378, 387, 452, 647, 739, 776, Title 28, and 611, Title 18, of the United States Code.

(d) *The two rules are not authorized by Section 27, Title 28, of the United States Code.*

Section 27 provides:

> "DISTRICTS WITH MORE THAN ONE JUDGE; DIVISION OF BUSINESS. In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district."

Judge Woolsey, who was one of the District Judges who made these rules, did not attempt to support these two rules by Section 27. He found his only authority for them in Section 731 (R. 713, 883, fols. 2648-2649). The appellants, however, now seek to support Rule 11-a under Section 27 as being a division of business among the Judges. That rule is clearly not in any sense a division of business nor an assignment of cases for trial. A rule which requires a litigant to make his application for a receiver to the Judge assigned to the Motion Part, has no relation whatsoever to the division of business between the individual Judges. An agreement as

to the division of business among the Judges is an arrangement by which they determine from day to day, or week to week, as to what individual Judge shall actually sit on a particular day in the Motion Part, as well as in the other parts of the court. Obviously, notwithstanding Rule 11-a, disagreements might frequently arise as to who was actually to sit in the Motion Part.

The petitioner Boehm says, on page 39 of her brief, with relation to said Section 27 that before Judge Manton acted the eight District Judges had "unanimously agreed upon the distribution among them of the Court's business for the current year. They had unanimously agreed upon and posted a schedule setting forth the sessions which each of them was holding during the period and the character of the business which each would then administer." That statement evidently refers to the schedule of "Assignment of judges and division of work" referred to by Judge Woolsey (R. 701).

Said schedule of assignments is an example of an agreement among judges for the division of business under said Section 27. It did assign individual judges to the particular parts of the court for the stated period. It did eliminate the chance of disagreement as to what judges should hold particular parts at stated times, but said Rules 1-a and 11-a decided no question as to what any particular judge should do or what part he should hold.

Said Section 27 was wholly unnecessary to enable the District Court judges to agree upon the assignments of judges. That was the natural thing for them to do and they needed no statutory authority. The obvious purpose of the statute was to give final authority to the Senior Circuit Judge if there was a dispute, and the matter of special significance is that he was given the final word. The statute plainly recognizes that his is the chief administrative authority for the circuit. The Senior Circuit Judges compose the annual conferences to be called by the Chief Justice (Sec. 218, Title 28, U. S. Code).

The petitioner Boehm, recognizing the infirmities of the petitioners' case, frankly asks this Court to lay to one side

the rules governing its review of the decisions of the lower courts and to exercise some general supervisory authority. But the statute vests the supervisory authority in such matters of administration as the division of business in the Senior Circuit Judge.

The statute neither expressly nor by implication gives the resident district judges, whether one or more than one, any supervisory authority over the designation of Senior Circuit Judges to hold District Courts. The statute does not provide that such designations be made on their request, and it gives them no power to determine what duties a designated judge shall perform.

To the contrary it says, with respect to Circuit Judges, that they "shall have all the powers, and rights, and perform all the duties, of a Judge of the district" save for the powers expressly excepted (Sec. 22), with respect to designated Judges from other districts or circuits, that they "may hold separately and at the same time a district court in the district or territory to which such Judge is designated and assigned and discharge all the judicial duties of the district or territorial judge therein" (Sec. 18), and with respect to either a designated District or Circuit Judge, that he shall "discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district" (Sec. 23).

True, disagreements might arise between designated judges and the resident district judge or judges over the division of business. If said Section 27 was intended to apply to such disagreements, as well as to disagreements among or between the resident district judges, it is quite plain that the designated judge must have a voice in any division of business affecting the performance of his duties, and that in case of disagreement the Senior Circuit Judge would have the final say, for it cannot be supposed that it was the intention of Congress to give the resident district judges, in districts having more than one, power over the duties to be

performed by a designated judge not given to the resident district judge in a district having but one. If that had been the intention, it would have been stated in express terms and not indirectly by conferring power upon the Senior Circuit Judge to act as umpire in the case of disagreements over the division of business between district judges.

If, however, said Section 27 was intended to apply only to disagreements among the resident district judges over the division of business, it necessarily follows that it was not intended to affect in any way the discharge of duties by a designated judge which were to be governed solely by the express provisions of Section 23.

It is unnecessary to enumerate the many reasons which might properly move the Chief Justice, the circuit justice or the senior circuit judge to designate a circuit judge to hear and determine a particular matter. The importance of the matter alone might be a sufficient reason. The petitioner Boehm refers to this case as one of "great economic, social and even political significance" (p. 15). It did then involve the public interest.

It is well known that the District Courts of the Southern District of New York, with all the help they can get from outside, are not sufficiently manned to dispose expeditiously of the business pending in those Courts (R. 556-559). As petitioner Johnson says (brief, pp. 10, 11), a receivership like that of the Interborough Rapid Transit Company demands a great deal of time of the judge having jurisdiction of it. If the Senior Circuit Judge felt that he was able, with his appellate duties, to devote the necessary time and thus to that extent relieve the District Courts of the pressure of work upon them, he had the power under the statute to designate himself for that reason alone, regardless of what the district judges themselves might think about it. The sole responsibility and duty of decision was his, and no arrangement among the resident district judges for the division of business as between themselves could deprive him of his power under the statute to act or of his jurisdiction, which the parties to the suit invoked.

His so-called division of business order was separate and distinct from the designation order, and indeed recited the designation order (R. 178, fol. 534). It was made because of said Rule 11-a and doubtless did construe it as a division of business. On that construction, if said Section 27 was intended to apply to disagreements between designated and resident judges, he was the final authority. In our view, however, said order was wholly unnecessary, just as said rule was wholly ineffective to deprive him of the jurisdiction conferred on him by statute.

Petitioner Boehm concedes, to be sure, for the sake of argument, that designated judges are district judges for the purpose of said Section 27 (Boehm brief, p. 47).

It matters little which hypothesis be accepted.

If designated judges are to be regarded as district judges within the meaning of said section, said rules required the assent of the designated judges and non-assenting judges were not affected by them.

If, however, said section was intended to apply only to disagreements among or between resident district judges, then the senior Circuit judge has the final word under said Section 27, and under Section 22 he has the power to designate any circuit judge, including himself, whose powers and duties are wholly defined by the statute and are not dependent at all upon agreements or disagreements under Section 27.

## POINT IV.

**Rules 1-a and 11-a, even if valid, do not have the effect of depriving a Judge of the jurisdiction conferred upon him by the statute, whether he be a Judge *de jure* or *de facto*.**

Undoubtedly a rule affecting the rights of litigants has the force of law, as, e. g., a rule limiting the time within which a notice to set aside a judgment must be made.

> *Rio Grande Irrigation Co.* v. *Gildersleeve*, 174 U. S. 603.

Likewise, an attorney who makes a contract for a division of fees in violation of public policy and a rule of court authorized by statute may not recover upon it.

*Weil* v. *Neary*, 278 U. S. 160.

The disregard of a procedural rule may constitute error reviewable on appeal, but procedural rules may be waived in the interest of justice and the disregard of them does not affect the jurisdiction.

*Abbott* v. *Brown*, 241 U. S. 606.

> "Every court of equity possesses the power to mould its rules in relation to the time and manner of appearing and answering, so as to prevent the rule from working injustice; and it is not only in the power of the court, but it is its duty to exercise a sound discretion upon this subject, and to enlarge the time, whenever it shall appear that the purposes of justice require it."
>
> *Ex parte Poultney* v. *City of LaFayette*, 12 Peters 472.

> "And it is also in the power of the court to suspend its own rules, or to except a particular case from its operation, whenever the purposes of justice require it."
>
> *United States* v. *Breitling*, 20 How. 252.

See:

> *Woodbury* v. *Jergens Co.*, 61 Fed. (2d) 736 (C. C. A., 2d, 1932).

An arrangement among Judges that one of them, i. e., the one who happens to be assigned to hold a particular part, shall transact a particular part of the business of the court is, at most, an arrangement of convenience not affecting jurisdiction.

There are numerous State decisions to the effect that despite rules for the apportionment of business into "parts," each Judge in every part has the power that any Judge has.

See:

*Matter of Petition of Argus Co.*, 138 N. Y. 557.
*State* v. *Lichtenberg*, 4 Wash. 553, 30 Pac. 659, 660 (1892).
*Foley* v. *Utterback*, 196 Ia. 956, 195 N. W. 721, 722 (1923).
*People* v. *Barbera*, 78 Cal. App. Rep. 277, 248 Pac. 304 (1926).
*State* v. *District Court of Lewis and Clark County*, 49 Mont. 158, 141 Pac. 151, 152 (1914).
*Bradley* v. *Van Nostrand*, 189 Cal. 457, 208 Pac. 690 (1922).

The appellants rely on *Case* v. *United States*, 14 Fed. (2d) 510 (C. C. A. 8th, 1926). In that case the Senior Circuit Judge resolved a disagreement between two District Judges by dividing the district and his action was ratified and approved by Congress. In practical effect, two districts were created, and the defendant was tried in one for an offense committed in the other.

## POINT V.

**The orders made by Judge Manton in the *Brake Shoe* suit were not subject to collateral attack.**

We have shown under Point I that Judge Manton was a Judge *de jure*, empowered by statute to hold a District Court, having the jurisdiction to transact the particular business. But if there had been some informality or irregularity in his designation, litigants were not bound to require the Judge to establish his authority before submitting their business to him.

Judge Mack has been for considerable time holding a District Court in the Southern District of New York under a designation of the Chief Justice, but we have ascertained that his designation is not on file with the Clerk of the District Court and that it is not the practice to file such designations with the Clerk of the District Court. The

statute does not require it in the case of the designation of Circuit Judges (Sec. 22), as in the case of District Judges (Sec. 17).

When a litigant finds a Circuit Judge holding a District Court, he has a right to assume that he has been properly designated. He does not have to take the risk of any possible infirmity in the designation. And even though there be such infirmity, the judgments rendered are valid and free from collateral attack.

*Ball* v. *United States,* 140 U. S. 118 (1891).
*McDowell* v. *United States,* 159 U. S. 596 (1895).
*Ex parte Henry Ward,* 173 U. S. 452 (1899).

Flexibility has always been one of the great merits of the Federal judicial system. To preserve that flexibility, when the Circuit Courts were abolished, the Congress provided for the designation of Circuit Judges to hold District Courts, not on account of the absence, disability, disqualification or bias of a District Judge or because of the accumulation or urgency of business as in the case of the designation of District Judges, but whenever the Chief Justice, the Circuit Justice or the Senior Circuit Judge thinks it in the public interest to make such designation. While designations of District Judges made under Sections 17, 19 and 21 have to be in writing and filed with the clerk, there is no provision for filing a designation under Section 22 with the clerk and no provision even that it must be a formal written designation, thereby further demonstrating the policy of having the Circuit Judges easily and instantly available for District Court work.

Litigants do not have to concern themselves with matters of administration. When they find a Circuit Judge holding a District Court they have a right to present their business to such Court and do not take the hazard of some irregularity or some informality in the manner of the Judge's designation to hold it, and especially is that true when the Judge having the power to designate is himself holding the Court. That *ipso facto* would constitute a designation even without a formal written order, and our information is that

Senior Circuit Judges in various circuits have frequently, without the formality of a written designation, held District Courts.

The disregard of a rule of practice or of an arrangement for convenience among Judges does not go to the jurisdiction of the Court. Judge Manton, holding a District Court by designation, with all of the rights and powers and duties of a District Judge, had jurisdiction to hear the *Brake Shoe* suit. The parties could waive any irregularity in the mode or process by which the suit came before him. If there was such irregularity, timely objection should have been made in the suit, but both of the parties to it consented to his taking jurisdiction.

All parties in interest were accorded the right to be heard on the return of the order to show cause why the receivership should not be continued. The overruling of any proper objection or the refusal of any proper request, e. g., one to transfer the cause to another judge, could have been reviewed by the Circuit Court of Appeals on an appeal from the order of September 28, 1932. The petitioners say that they did not know that until the Circuit Court of Appeals had spoken in the instant case, but that was the settled practice in the Second and other Circuits as shown by Judge Learned Hand (R. 1033).

See:

*Kingsport Press* v. *Brief English Systems,* 54 Fed. (2d) 497 (C. C. A. 2d, 1913).

*Christian* v. *Hoe, Inc.,* 63 Fed. (2d) 218 (C. C. A. 2d).

*Mitchell* v. *Lay,* 48 Fed. (2d) 79, 84, 85 (C. C. A. 9th).

*Pacific Northwest Packing Co.* v. *Allen,* 109 Fed. 575 (C. C. A. 9th, 1901).

The petitioners say that they could not intervene without recognizing the propriety of the main proceeding, citing Equity Rule 37 and *United States* v. *California Canneries,* 279 U. S. 553, and other cases (Johnson Brief, p. 25; Boehm

Brief, p. 57). But they did not have to apply for intervention. If not technically cited, they at least had notice that they could appear and be heard.

Moreover, they have recognized the propriety of the main proceeding, for they themselves request the appointment of receivers for both companies. Judge Woolsey himself held that the District Court acquired and retained jurisdiction to appoint receivers perforce of the filing of the bill in the *Brake Shoe* case.

Petitioner Johnson appears to question the statement of Judge Learned Hand that "the dispute touches merely who shall be the receivers and who the judge to have charge of the receivership" (Johnson Brief, p. 3), but petitioner Boehm more frankly says, "Petitioners were not seeking a complete disruption of the receivership proceedings. Substantially, they sought only a removal of the proceedings to the proper district and an appointment of different and independent receivers" (Boehm Brief, p. 20). Said petitioner further says at page 26 of her brief:

> "Petitioners, however, were not challenging the propriety of the appointment of receivers for the Interborough. They were willing to concede that a receivership for the Interborough would be proper. What they were objecting to was the appointment of the particular receivers by the particular judge."

That relief was to be applied for in the suit itself. Likewise the charge that the suit was collusive, even if made as claimed in the *Johnson* suit, was one to be made in the suit itself and if sustained the Court is commanded by the statute to dismiss (Sec. 80, Title 28, U. S. Code). There is, and can be, no charge made in this case that the parties have been collusively made or joined for the purpose of creating a case cognizable by the Federal court.

Instead of adopting independent measures to enforce their individual and particular rights, intervenors representing all interests involved, not merely committees for security-holders, but trustees, and even the Manhattan Company itself and its bondholders and stockholders have submitted

those rights to a tribunal which they supposed, and were justified in supposing, was competent to deal equitably with all interests. If they were in error, if the supposed court was not a court at all but only an individual, the resulting prejudice will be their misfortune. But if the supposed court was a court *de jure* or *de facto*, their intervening rights are not to be prejudiced by some defect or irregularity in the mode of invoking the jurisdiction.

If Judge Manton was no more than a *de facto* Judge, his jurisdiction could not be attacked collaterally even in the *Brake Shoe* suit itself. Any irregularity in the exercise of the jurisdiction or in the manner in which jurisdiction was invoked might be reviewed in the suit itself, but could not be raised in a collateral suit.

*Grant* v. *Leach & Co.*, 280 U. S. 351.
*Santiago* v. *Nogueras*, 214 U. S. 260, 267, 268.
*Cadle* v. *Baker*, 20 Wall. 650.
*Maxwell* v. *Stewart*, 21 Wall. 71.

See also:

*Ex parte American Steel Barrel Co.*, 230 U. S. 35, 45.

Petitioner Johnson invokes the well-settled rule that a *de facto* officer and a *de jure* officer cannot be acting in the same office at the same time (Johnson Brief, p. 35).

But said petitioner confuses, as indeed did Judge Woolsey, the office of judge and the jurisdiction of the judge with the places where the judge happens to be holding his court.

Judge Manton was in truth a *de jure* judge designated to hold a District Court with jurisdiction under the statute in law and equity. He certainly had color of authority to exercise all the rights, powers and duties of a District Judge, none the less so because other Judges had arranged among themselves that particular business should be transacted by the Judge who happened at the moment to be assigned to hold a particular part of the court.

Litigants would be in a sorry plight indeed if the adjudication of their rights could be set at naught in a collateral suit for some procedural defect or for the failure of a judge to observe even a proper agreement under the statute for the distribution of business of the court into parts.

## POINT VI.

**The petitioners' specifications of error do not refer to the reversal of Judge Woolsey's order consolidating the *Johnson* suit and the *Brake Shoe* suit. Said order was unauthorized, and in any case the two suits remained distinct despite it.**

Judge Woolsey consolidated the two causes "on his own initiation against the objection and protest" of the parties to the *Brake Shoe* suit and the intervenors therein (R. 722, 723). His reason for doing so is frankly stated by him to arise from "a residuum of doubt whether, so long as they (the *Johnson* suit and the *Brake Shoe* suit) remain separate causes, an order could properly be made in the *Johnson* case, Equity No. 71-153, which would affect the receivership orders and the other orders made in the *American Brake Shoe & Foundry Company* case, Equity No. 70-364" (R. 710, 711). He did so in order that the complainants in the *Johnson* suit might "remain at large to challenge the jurisdiction of Judge Manton to make the orders" in the *Brake Shoe* suit (R. 711).

The power to consolidate actions is given by Section 734, Title 28 of the United States Code, as follows:

> "SEC. 734. *Orders to save costs; consolidation of causes of like nature.* When causes of a like nature or relative to the same question are pending before a court of the United States, * * * the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

The *Johnson* suit and the *Brake Shoe* suit were not "causes of a like nature or relative to the same question." The *Brake Shoe* suit was a suit by a creditor of the Interborough to marshal assets. The *Johnson* suit was a suit by a stockholder of Manhattan, on behalf of himself and other stockholders of the Manhattan, suing in a derivative capacity to have an accounting as between Manhattan and Interborough under the Manhattan lease. Instead of being of a like nature with the *Brake Shoe* suit, the *Johnson* suit was a collateral attack upon the entire proceeding in the *Brake Shoe* suit.

See:

*Adler* v. *Seaman,* 266 Fed. 828 (C. C. A. 8th, 1920), cert. denied 254 U. S. 635.

While Boehm, in her so-called supplemental complaint, sued as a contract creditor of the Interborough (R. 81), she obviously, as a mere intervenor in the *Johnson* suit, cannot, by a so-called "supplemental" bill, give a different character to that suit. So far as the supplemental bill of complaint of Boehm is concerned, it should be disregarded and ignored for lack of jurisdiction in the Court to entertain it. It was an obvious attempt by Boehm, a citizen of New York, to get into the Federal court in a suit against the Interborough, another citizen of New York, by first obtaining an intervention in the Manhattan stockholders' suit claiming, for the purposes of obtaining the intervention, to be a stockholder of Manhattan, and then utilizing the intervention obtained under that guise as a basis for a complaint made solely as a creditor of Interborough.

In view of the appointment of a Receiver for Manhattan in the *Brake Shoe* suit, any cause of action which Manhattan had against Interborough for an accounting would be enforceable only by the Receiver of Manhattan and therefore the derivative action which was instituted by Johnson could not properly proceed. This was the express ruling in *Mueller* v. *Adler,* 292 Fed. 138, the case dealing with the later history of *Adler* v. *Seaman,* 266 Fed. 828.

The statute requires that the consolidation must appear to be "reasonable." None of the parties requested this consolidation and it was against the interests of most of the parties that the same should be made. It certainly is not reasonable that against the protests of the parties to one suit it should be consolidated with another solely for the foreign and collateral purpose of enabling a stranger to the suit to acquire some kind of a status to collaterally attack the proceedings in the suit and to nullify all that had been done in the suit to date. It had the effect of forcing the parties to the *Brake Shoe* suit, in the language of Judge Hand in the Court below, "into a partnership to which they should not have been subjected" (R. 1035).

Moreover, despite the order of consolidation, the two suits remained distinct and independent, as petitioner Johnson concedes (Johnson brief, p. 70). The parties to the *Johnson* suit did not become parties to the *Brake Shoe* suit.

Consolidation is a mere mechanical convenience for carrying on two suits involving the same issues. It does not change the status of the parties or affect their rights. The parties and the issues in each suit remain the same as before consolidation.

*Toledo etc. R. R. Co.* v. *Continental Trust Co.*, 95 Fed. 497 (C. C. A. 6th, 1899).

*Adler* v. *Seaman*, 266 Fed. 828 (C. C. A. 8th, 1920); certiorari denied, 254 U. S. 655.

*Taylor* v. *Logan Trust Co.*, 289 Fed. 51 (C. C. A. 8th, 1923).

*Vapor Car Heating Co.* v. *Gold Car Heating & L. Co.*, 296 Fed. 201 (D. C., S. D. N. Y., 1923).

*Nolte* v. *Hudson Navigation Co.*, 11 Fed. (2d) 680, 682 (C. C. A. 2d, 1926).

Petitioner Johnson says that it was within the discretion of Judge Woolsey to consolidate the two actions (Johnson brief, p. 68). Even so, that discretion was reviewable by the Circuit Court of Appeals.

## POINT VII.

**The petitioners have no standing in an independent suit either to apply for the appointment of receivers of the Interborough or to attack the orders appointing such receivers.**

Neither Johnson as a stockholder of the Manhattan Company, nor Boehm as a creditor of the Interborough, had any standing to obtain the appointment of receivers of the Interborough without its consent. At best, they were asserting contract claims.

*Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491.

The claim of the Manhattan Company against the Interborough asserted by Johnson was even undetermined. *Johnson's* suit is for an accounting and he has not even yet established his right to that.

As a stockholder of the Manhattan Company, Johnson has no standing whatever either to apply for the appointment or to object to the appointment of receivers of the Interborough Company, and by her intervention in the *Johnson* suit, certainly Boehm acquired no rights except in her status as a stockholder of the Manhattan Company, on which she was granted intervention.

Petitioner Boehm is a resident of New York (R. 81). She applied for intervention in the *Johnson* suit on the theory that she was one of the class in whose behalf the suit was brought, i. e., was the owner of 1,400 shares of stock of the Manhattan Company (R. 139). That petition was filed on the same day that the *Johnson* bill was filed and on the consent of the complainant she was allowed to intervene (R.

138). That intervention, by consent, would have deprived the Court of jurisdiction (since the Court had no *res* in its possession) but for the fact that Boehm was allowed to intervene as a stockholder of the Manhattan Company.

*Forest Oil Co.* v. *Crawford*, 101 Fed. 849 (C. C. A. 3rd, 1900).

*Gaddis* v. *Junker*, 27 Fed. (2d) 156 (D. C., E. D. Texas, 1928).

However, in the "supplemental" bill of complaint which she filed in the *Johnson* suit, after intervention, she asserted rights only as the owner of Interborough bonds and notes (R. 81). Thereupon Johnson filed a supplemental bill in which he said that his suit was brought on behalf of "Manhattan and all stockholders similarly situated, including bondholders and all others financially interested in said company," and that petitions for intervention had been filed "by other stockholders and bondholders of the Manhattan and Interborough Companies" (R. 50). He, however, asserted no rights except as a stockholder of the Manhattan Company.

The Federal court would have had no jurisdiction of a suit brought by the petitioner Boehm as a bondholder or noteholder of the Interborough Company for there would have been no diversity of citizenship. She could not give the Federal court jurisdiction of her claims as a simple contract creditor of the Interborough by the device to which she resorted.

However, Boehm as a creditor of the Interborough and Johnson as a stockholder of the Manhattan asserting derivative rights in its behalf were accorded the right to be heard in the *Brake Shoe* suit by the order appointing receivers.

## POINT VIII.

**The question as to the power of the Court to appoint receivers at the suit of a simple contract creditor on the consent of the defendant and the question as to whether the *Brake Shoe* suit was collusive are separate and distinct questions. Neither is presented by the record.**

The Johnson bill of complaint did not so much as charge that the plaintiff in the *Brake Shoe* suit was a simple contract creditor. It merely alleged that Receivers of the Interborough were appointed on August 26, 1932, on a bill filed in the office of the Clerk (R. 14, fol. 41).

The *Johnson* complaint did not contain any allegation that the proceeding was collusive, or allege any facts whatsoever from which collusion might be inferred. It did allege that it was important to have independent Receivers, disconnected with the old management (R. 24, fol. 70), that one of the Receivers was associated with the designated attorneys for the Receivers and that that firm of attorneys or certain members of it had been associated with the Brooklyn-Manhattan Transit Company, which owned shares of the Interborough (R. 24, fols. 71-72), that the appointment of the Receiver of the Manhattan Railway Company was sponsored by the Brooklyn-Manhattan Transit Company-Interborough interests, and that there was need of an independent Receiver (R. 25, fols. 75-76), that there were common directors of the Interborough and the Manhattan (R. 31, fol. 91), that there was great danger that trustees or bondholders would set aside the receiverships and obtain the appointment of Receivers in the State courts, which would result in "hopeless confusion and chaos" and "injury, damage and inconvenience to the travelling public" (R. 37, fol. 109).

The unsupported and unwarranted contention now made that the *Brake Shoe* suit was started with the ulterior object of bringing about an unjustifiable disaffirmance of the Man-

hattan lease is negatived in the *Johnson* bill of complaint. The concluding allegation of that complaint, before the prayers, states (R. 42, fol. 125):

> "Indeed the mounting losses of Interborough from the operation of the elevated division including the Manhattan lines, make his (Mr. Hedley's) statements most significant at the present time now that Interborough and Manhattan are in need of receivership. Interborough's receivers are in duty bound to protect its security holders and stockholders from further heavy losses. Interborough can in all probability be saved from further loss by the disaffirmance of the lease. There is, therefore, in view of the premises an imperative, urgent and immediate need of an independent and proper receiver and/or receivers being appointed to protect the interests of Manhattan."

See also paragraph 41 of the *Johnson* bill (R. 40) and paragraph IX of the supplemental bill (R. 57).

The theory of the *Johnson* bill was that the immediate appointment of Receivers was imperative, that Judge Manton's orders were void for the violation of Rules 1-a and 11-a, wherefore the Court should appoint independent Receivers in the *Johnson* suit to prevent chaos and irreparable injury and damage.

The trustees and committees for bondholders whom the complainant feared would institute foreclosures and have Receivers appointed in the State courts have intervened in the *Brake Shoe* suit and are supporting the receiverships, as stated in the preliminary statement of facts. Even if the *Johnson* bill had charged that the proceedings were collusive, that, and the question of the propriety of appointing Receivers at the suit of a simple contract creditor consented to by the defendant, were questions to be raised in the *Brake Shoe* suit itself, not in a collateral suit. The only basis for a collateral suit, if otherwise well brought, would have been the nullity of the proceedings in the *Brake Shoe* suit, and indeed that was the sole basis of the *Johnson* suit. Receivers had been appointed, so it was alleged, by orders that were absolutely null and void, wherefore and because of the

urgency of the immediate appointment of Receivers it was necessary for the Court to intervene and, by the appointment of Receivers by a valid order, prevent chaos and irreparable injury.

The defendant in the *Brake Shoe* suit could not deny the facts, asserted by the appellants themselves, which showed that the appointment of Receivers was urgent and imperative. It was compelled by the facts to admit the allegations of the bill and its Board of Directors, knowing that it could not provide for the payment of large amounts shortly maturing (R. 160), would have been remiss in their duty under the conceded facts not to have consented to the immediate appointment of receivers. Thereby the defendant waived the point that the plaintiff had not exhausted its remedies, which point was successfully made by the defendant in *Pusey & J. Co.* v. *Hanssen* (261 U. S. 491).

This was not the case of a receivership for the conservation of the assets of a *solvent* corporation, as was the case of *Michigan* v. *Michigan Trust Co.* (286 U. S. 334). But the Court did not hold even in that case that the District Court was without jurisdiction to appoint Receivers on the bill of a simple contract creditor consented to by the defendant. What the Court said was that such receiverships were to be "watched with jealous eyes lest their function be perverted." The place for that watchfulness was in the very action in which the Receivers were appointed. The order appointing temporary Receivers in the *Brake Shoe* suit expressly invited creditors and other parties in interest to appear and be heard (R. 184). They were not even put to the necessity of moving for intervention. "Any other creditor" or "other party in interest" could have been heard and there or upon appeal could have secured redress for any abuse or misuse of the process of the Court. But the conceded fact is that there has been no such abuse, and the sole ground of attack is that the Court was without jurisdiction.

In *Harkin* v. *Brundage*, 276 U. S. 36, relied upon by the petitioners, the jurisdiction of the District Court to appoint Receivers was necessarily recognized, since condi-

tions were imposed upon the turning over of the property to the State court which had first acquired jurisdiction.

The receivership in the instant case was not designed to forestall *the normal process of administration in bankruptcy* or to conserve the assets of a solvent company or to enable "a tottering business to continue while creditors are held at bay" or improperly to defeat the jurisdiction of a State court. *Upon the conceded facts*, a receivership was imperative to prevent dismemberment of a great property devoted to the public use and to effect a reorganization just and equitable to all interests.

For the defendant, under the circumstances, to insist that the plaintiff should first exhaust its legal remedies, as it had a right to do, would have invited irreparable injury to those whom it owed a duty to protect. It was not obliged to hold its assets as a prize to the swift in the race of creditors to secure liens, and had any "other creditor" or "other party in interest" made timely objection on the return of the order to show cause, such objection should have been overruled in the interest of fairness and equity to all.

An equity receivership is the only practical way to prevent dismemberment and destruction of a great railway property like the Interborough. Bankruptcy was not available. No other remedy was adequate. Sequestration at the suit of a judgment-creditor with execution returned unsatisfied under Section 70 *et seq.* of the General Corporation Law of New York or dissolution under Section 100 *et seq.* of said statute are destructive remedies not suited to the case of a great public service corporation.

The Court not only had jurisdiction but, upon the conceded facts, it properly exercised its jurisdiction to appoint Receivers. The trustees under the First and Refunding Mortgage of the Interborough and of the Consolidated Mortgage of the Manhattan Railway Company and responsible committees representing the different classes of bondholders and noteholders have not sought the destructive remedies in the State courts apprehended by the petitioners, but have submitted their rights to a court of equity which can prevent

dismemberment of the property, maintain the public use and protect the rights of all. Their course should not be suffered by a court of equity to result to their prejudice at the instance of those palpably seeking to promote special and particular interests.

This Court has but recently reaffirmed the jurisdiction of the Federal courts to appoint Receivers at the suit of a simple contract creditor if the defendant consent to the decree.

*Shapiro* v. *Wilgus*, 287 U. S. 348, 356.

In every case in which the subject has been considered by this Court the jurisdiction has either been assumed or necessarily decided. The warnings of this Court have been directed not to the legitimate exercise of the jurisdiction but to the abuse of it, to the improper hindrance and delay of creditors.

*Re Metropolitan Ry. Receivership*, 208 U. S. 90.
*Pusey & J. Co.* v. *Hanssen*, 261 U. S. 491.
*United States* v. *Butterworth-Judson Corp.*, 269 U. S. 504.
*Harkin* v. *Brundage*, 276 U. S. 36.

The petitioners do not complain of the fact that the Court exercised its jurisdiction to appoint Receivers. They themselves asked for the appointment of Receivers and asserted the urgency and indeed the imperative necessity of such appointment. Indeed, it was only after Judge Manton's refusal to appoint the Receivers requested by them (*supra*, pp. 9, 10) that they attacked the jurisdiction which they themselves had invoked.

As pointed out in Point VII above, both Johnson and Boehm have, at very best, only the position of simple contract creditors, seeking a receivership in the *Johnson* suit and their belated complaint that the Brake Shoe Company is only a simple contract creditor is, to say the least, slightly inconsistent.

Certain propositions are so well settled by the decisions of this Court that the bare statement of them suffices.

The objection that a party seeking equitable relief has not exhausted his legal remedies may be waived.

*Re Metropolitan Ry. Receivership,* 208 U. S. 90, 110.
*McGowan* v. *Parish,* 237 U. S. 285, 295.
*Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371, 380.
*Brown* v. *Lake Superior Iron Co.,* 134 U. S. 530.
*Price* v. *United States,* 269 U. S. 492.
*Stripe* v. *United States, id.,* 503.
*United States* v. *Butterworth-Judson Corp., id.,* 504.

Where the complainant is a *bona fide* owner of the claim sued on and there is the requisite diversity of citizenship, the motives for seeking Federal jurisdiction are immaterial.

*Blair* v. *City of Chicago,* 201 U. S. 400, 448.
*Dickerman* v. *Northern Trust Co.,* 176 U. S. 181.
*Black & W. T. & T. Co.* v. *Brown & Y. T. & T. Co.,* 276 U. S. 518.

The co-operation of the defendant does not make the suit collusive or prevent it from being a justiciable controversy.

*Re Metropolitan Ry. Receivership,* 208 U. S. 90.
*Brown, Bonnell & Co.* v. *Lake Superior Iron Co.,* 134 U. S. 530, 534.
*Black & W. T. & T. Co.* v. *Brown & Y. T. & T. Co.,* 276 U. S. 518.
*United States* v. *Butterworth-Judson Corp.,* 269 U. S. 504.

See:

*Hefner* v. *Northwestern Life Ins. Co.,* 123 U. S. 747, 756.

## POINT IX.

### The *Johnson* suit was not a direct attack.

In this Court, for the first time, the petitioners are now claiming that the *Johnson* suit is not a collateral attack (Johnson brief, p. 53).

Petitioner Boehm likens it to a suit to set aside a judgment or decree for fraud (Boehm brief, p. 21).

But no charge of fraud was either preferred or tried before Judge Woolsey.

We say that no charge that the *Brake Shoe* suit was collusive was even made in the *Johnson* bill. At most, evidence was pleaded from which the Court is now asked to infer a charge not pleaded.

But answers to the Johnson bill had not yet been filed when the motions were made before Judge Woolsey. The issues had not been joined, let alone tried. Upon the proceedings in the *Brake Shoe* suit and the bills and supplemental bills and petitions in the *Johnson* suit, without the trial of any issue and before even the joinder of issue, Judge Woolsey set aside all of the orders in the *Brake Shoe* suit as *coram non judice* solely and only because Judge Manton had entertained jurisdiction despite Rules 1-a and 11-a and had thereby become, as Judge Woolsey held, an "intruder," an "usurper," a mere individual without even the color of judicial authority.

If that decision be sound, it may be assumed that Judge Manton's orders could be attacked collaterally or even ignored in another suit, but if unsound this record presents no question for review by this Court.

## POINT X.

**The rights of the intervenors have become paramount.**

The interests of the original parties to the suit are now subordinate to those of the intervenors, including the Manhattan Company itself, its bondholders, its mortgage trustees and its stockholders. The matter of paramount importance and public interest is the protection of those interests, which have been submitted to the court in the *Brake Shoe* suit, in which receiverships of great and complicated interests have now been administered for eight months in both the Eastern and Southern Districts of New York. Surely, the vast inter-

ests of the intervenors are not to be put in jeopardy by a dispute between judges over matters of administration or calendar practice.

* * *

If the orders of Judge Manton were "*coram non judice*" and "wholly void and of no juridical effect," the consequences are inescapable, however disastrous that may be to the complicated interests involved in a receivership which has now been administered for eight months in two districts.

But counsel for petitioner Boehm, who signed the *Johnson* bill as "of counsel," appears to appreciate that that extreme position is untenable, and so he appeals to the "broad supervisory power" of this Court to correct what he claims was an irregular and improper exercise of jurisdiction. Realizing the serious consequences of the extreme position of his colleague, he suggests that a reversal be accompanied by a condition "that all proper acts of the receivership which it would be unjust to undo, be validated."

Through the Boehm intervention, the complainant's counsel in the *Johnson* suit have been able to file separate briefs, nominally for different parties, and thus to present divergent views and to becloud the real issues with much irrelevant matter. But the two positions taken by them are mutually destructive. Entire absence of jurisdiction is one thing; irregularity or even impropriety in the exercise of jurisdiction a totally different thing. One negatives the other.

If the questions raised in this case touch only the manner of the exercise of jurisdiction, they certainly cannot be raised in a collateral suit and there is plainly nothing for this Court to review.

If they touch merely the authority of Judge Manton to hold a District Court, with all the rights and powers and duties of a District Judge, they could not be raised collaterally even in the *Brake Shoe* suit itself.

The sole question before the Court is whether Judge Manton had jurisdiction of the *Brake Shoe* suit.

Wherefore we have not thought it necessary or fitting to consider the irrelevancies injected into the case by methods which seem to characterize the efforts of those pursuing ulterior aims.

If Judge Manton had jurisdiction of the *Brake Shoe* suit, the rights of the intervenors have become of paramount importance. They are not to be prejudiced or put in jeopardy by attacks in a collateral suit by strangers to the *Brake Shoe* suit.

## IN CONCLUSION.

## POINT XI.

**The decree of the Circuit Court of Appeals should be affirmed.**

Respectfully submitted,

NATHAN L. MILLER,
Counsel for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of the Interborough Rapid Transit Company, Respondents.

NATHAN L. MILLER,
WILLIAM W. MILLER,
CARL M. OWEN,
HAROLD J. GALLAGHER,
of Counsel.

---

On behalf of the respondent Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, of Interborough Rapid Transit Company, the undersigned joins in the foregoing brief and submits that the decree of the Circuit Court of Appeals should be affirmed.

CLOYD LAPORTE,
Counsel for respondent Committee for the Protection of the Holders of Ten-Year Six Per Cent. Gold Notes, due October 1, 1932, of Interborough Rapid Transit Company.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

---

No. 711 AND No. 721.

---

BENJAMIN F. JOHNSON,
Petitioner,

against

MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

---

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

---

IN THE MATTER

OF THE

INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

---

*Sirs:*

TAKE NOTICE that the within is a copy of a "List of 84 Opinions Reported in the Federal Reporter, which were written in Cases heard by the Senior Circuit Judge Holding

a District Court," which the undersigned will ask leave to present to the Honorable Willis Van Devanter, Associate Justice of the Supreme Court of the United States, for the information of the Court.

Dated, New York, N. Y., April 28, 1933.

NATHAN L. MILLER,
Counsel for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, Respondents.

To:

CHARLES FRANKLIN, Esq.,
Counsel for Petitioner Benjamin F. Johnson.

LOUIS BOEHM, Esq.,
Counsel for Petitioner Lillian Boehm.

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SUPREME COURT OF THE UNITED STATES,

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IN THE MATTER

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INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

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## LIST OF 84 OPINIONS REPORTED IN THE FEDERAL REPORTER, WHICH WERE WRITTEN IN CASES HEARD BY THE SENIOR CIRCUIT JUDGE HOLDING A DISTRICT COURT.

An analysis shows that, of the 84 opinions in the following list, 17 were written in the First Circuit, 51 in the Second,

3 in the Third, 2 in the Fourth, 6 in the Seventh and 5 in the Eighth. There is appended hereto (pp. 13 *et seq.*) a copy of an order of Senior Circuit Judge Sanborn, made while he was holding a District Court in the Eighth Circuit, appointing Receivers for the St. Louis and San Francisco Railroad Company.

193 Fed. Rep.

page 286 Penn Steel Co. v. New York City Railway Co.

Central Trust Co. v. Third Avenue R'way Co. (4 cases). LACOMBE, S. C. J., 2nd.

194 Fed. Rep.

page 448 Weed Chain Grip Co. v. Atlas Chain Co. LACOMBE, S. C. J., 2nd.

543 Pennsylvania Steel Co. v. N. Y. City Ry. Co. LACOMBE, S. C. J., 2nd.

546 Pennsylvania Steel Co. v. N. Y. City Ry. Co. LACOMBE, S. C. J., 2nd.

893 National El. Sig. Co. v. Telefunken Wireless, et al. LACOMBE, S. C. J., 2nd.

195 Fed. Rep.

page 84 Brown & Sharp Mfg. Co. v. Coates Clipper Co. COLT, S. C. J., 1st.

96 Carpenter v. Knollwood Cemetery, et al. COLT, S. C. J., 1st.

173 New York Times v. Sun Printing & Publishing Co. LACOMBE, S. C. J., 2nd.

299 In re Steiner. LACOMBE, S. C. J., 2nd.

614 Penn. Steel Co. v. N. Y. City Ry. Co. LACOMBE, S. C. J., 2nd.

196 Fed. Rep.

page 215 Parsons Non-Skid Co. v. Asch. LACOMBE, S. C. J., 2nd.

661 Pennsylvania Steel Co. v. N. Y. City Ry. Co. (several cases). LACOMBE, S. C. J., 2nd.

198 Fed. Rep.

page 297 Carpenter v. Knollwood Cemetery. COLT, S. C. J., 1st.

355 United States v. Hankey. COLT, S. C. J., 1st.

959 A. Stein & Co. v. Liberty Garter Mfg. Co. LACOMBE, S. C. J., 2nd.

199 Fed. Rep.

page 189 Browning Hook & Eye Co. v. Tri-Eye Hook & Eye Co. LACOMBE, S. C. J., 2nd.

440 Perfection Cooler Co. v. Cordley. COLT, S. C. J., 1st.

200 Fed. Rep.

page 107 Coca-Cola Co. v. American Druggists Syndicate, et al. Trade-mark injunction. LACOMBE, S. C. J., 2nd.

312 Pennsylvania Steel Co., et al. v. N. Y. City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

201 Fed. Rep.

page 418 Pennsylvania Steel Co., et al. v. N. Y. City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

781 Pennsylvania Steel Co., et al. v. N. Y. City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

202 Fed. Rep.

page 296 Pennsylvania Steel Co., et al. v. N. Y. City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

598 Cilley v. United Shoe Machinery Co. COLT, S. C. J., 1st.

602 Strout v. United Shoe Machinery Co. COLT, S. C. J., 1st.

607 Penn. Steel Co. v. N. Y. City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

803 U. S. v. Nipissing Mines Co. Tariff Act. LACOMBE, S. C. J., 2nd.

203 Fed. Rep.

page 292 U. S. ex rel. Schleiter v. Williams. Immigration Act. LACOMBE, S. C. J., 2nd.

521 Continental Securities Co. v. Interborough R. T. Co., et al. Injunction. LACOMBE, S. C. J., 2nd.

1021 Patterson v. Bucknall S. S. Lines, Limited. LACOMBE, S. C. J., 2nd.

204 Fed. Rep.

page 136 Penn. Steel Co., et al. v. N. Y. City Ry. Co., et al. Receivership. LACOMBE, S. C. J., 2nd.

844 U. S. ex rel. Aronowicz v. Williams. Deportation of Aliens. LACOMBE, S. C. J., 2nd.

846 U. S. ex rel. Goncaloes, et al. v. Williams. Deportation of Aliens. LACOMBE, S. C. J., 2nd.

847 U. S. ex rel. Kutas v. Williams. Deportation of Aliens. LACOMBE, S. C. J., 2nd.

848 U. S. ex rel. La Fata v. Williams. Deportation. LACOMBE, S. C. J., 2nd.

208 Fed. Rep.

page 168 Penn. Steel Co. v. New York City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

205 Sperry & Hutchinson Co. v. Associated Merchants Stamp Co. Injunction. LACOMBE, S. C. J., 2nd.

419 Vacuum Cleaner Co. v. Am. Rotary Valve Co. Patents. LACOMBE, S. C. J., 2nd.

747 Penn. Steel Co. v. N. Y. City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

757 Penn. Steel Co., et al. v. N. Y. City Ry. Co., et al., in re Second Ave. Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

777 Penn. Steel Co., et al. v. N. Y. City Ry. Co. in re Central Park Co. Receivership. LACOMBE, S. C. J., 2nd.

209 Fed. Rep. page 495 — Notaseme Hosiery Co. v. Straus, et al. Trademarks. LACOMBE, S. C. J., 2nd.

211 Fed. Rep. page 236 — U. S. ex rel. Gegiow, et al. v. Uhl. Alien Deportation. LACOMBE, S. C. J., 2nd.

212 Fed. Rep. page 958 — Imperial Machine Co. v. Jacobus. Patents. LACOMBE, S. C. J., 2nd.

217 Fed. Rep. page 66 — Asbestos Shingle, Slate & Sheathing Co. v. Rock Fibre Mfg. Co. BAKER, S. C. J., 7th.

423 — Penn. Steel Co. v. N. Y. City Ry. Co. LACOMBE, S. C. J., 2nd.

219 Fed. Rep. page 939 — Penn. Steel Co. v. N. Y. City Ry. Co. LACOMBE, S. C. J., 2nd.

220 Fed. Rep. page 541 — U. S. v. Sisson. Deportation. LACOMBE, S. C. J., 2nd.

221 Fed. Rep. page 440 — Penn. Steel Co. v. N. Y. City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

222 Fed. Rep. page 96 — U. S. ex rel. Schlimm v. Howe. Deportation Case. LACOMBE, S. C. J., 2nd.

693 — U. S. v. Sisson. Deportation. LACOMBE, S. C. J., 2nd.

223 Fed. Rep. page 809 — U. S. v. Moy You. Deportation. LACOMBE, S. C. J., 2nd.

224 Fed. Rep. page 520 — U. S. v. Moy Toom. Deportation. LACOMBE, S. C. J., 2nd.

225 Fed. Rep.
page 96 Penn. Steel Co. v. N. Y. City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.
106 Penn. Steel Co. v. N. Y. City Ry. Co. Receivership. LACOMBE, S. C. J., 2nd.

226 Fed. Rep.
page 359 Bowker v. Donnell. Negligence. LACOMBE, S. C. J., 2nd.
990 Stevenson v. Fox. Patents. LACOMBE, S. C. J., 2nd.

228 Fed. Rep.
page 392 Postal T. & C. Co. v. Ingraham. PUTNAM, S. C. J., 1st.

229 Fed. Rep.
page 465 Penn. Steel Co. v. N. Y. City Ry. Co. LACOMBE, S. C. J., 2nd.

241 Fed. Rep.
page 943 The Leslie. Admiralty. BUFFINGTON, S. C. J., 3rd.

246 Fed. Rep.
page 260 North American Co. v. St. Louis & S. F. R. R. Co. SANBORN, S. C. J., 8th.*

247 Fed. Rep.
page 620 Ingersoll, et al. v. Doyle, et al. Trade-mark. DODGE, S. C. J., 1st.

253 Fed. Rep.
page 63 U. T. S. Rubber Co. v. Panther Rubber Co. DODGE, S. C. J., 1st.

255 Fed. Rep.
page 129 Hiram Walker & Sons, Ltd. v. Corning & Co. BAKER, S. C. J., 7th.

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* A copy of the order appointing the receivers of the St. Louis & S. F. R. R. Co. in the United States District Court for the Eastern District of Missouri, dated May 27, 1913, signed by Senior Circuit Judge Walter H. Sanborn, is appended hereto. In this connection, see *St. Louis & S. F. R. R. Co.* v. *Spiller*, 274 U. S. 304.

259 Fed. Rep. page 913 — Novitzky v. Rozner. Jurisdiction. BUFFINGTON, S. C. J., 3rd.

264 Fed. Rep. page 247 — Supreme Tribe of Ben Hur v. Cauble. Injunction. BAKER, S. C. J., 7th.

265 Fed. Rep. page 805 — Kuhnhold v. Deutsch-Austalische Dampfschiffs Gesellschaft. Admiralty. WARD, S. C. J., 2nd.

267 Fed. Rep. page 733 — Aktieselskabet Fido v. Lloyd Brazileiro. Admiralty. WARD, S. C. J., 2nd.

270 Fed. Rep. page 229 — Mayer v. Garvan. Trading With the Enemy Act. BINGHAM, S. C. J., 1st.

272 Fed. Rep. page 699 — Long v. Union Trust Co. BAKER, S. C. J., 7th.

275 Fed. Rep. page 206 — William H. Haskell Mfg. Co. v. Nelson Blower & Furnace Co. BINGHAM, S. C. J., 1st.

278 Fed. Rep. page 945 — Anderson Coal Co. v. Waban Rose Conservatories. BINGHAM, S. C. J., 1st.

285 Rep. Rep. page 791 — Pittsburgh Coal Washer Co. v. Slag Rock Mach. Co. Patents. BUFFINGTON, S. C. J., 3rd.

288 Fed. Rep. page 612 — N. A. Co. v. St. Louis & S. F. R. Co. Receivership. SANBORN, S. C. J., 8th.

292 Fed. Rep. page 511 — U. S. v. New England Fish Exchange, et al. Monopolies. BINGHAM, S. C. J., 1st.

3 Fed. 2nd page 34 — Henrici Co. v. Reinecke (Dec., 1924, N. D. Ill.). Taxes. ALSCHULER, S. C. J., 7th.

9 Fed. 2nd page 980 — Rosemary (Feb., 1925, E. D. Va.). Admiralty. WADDILL, S. C. J., 4th.

10 Fed. 2nd 372 — Whittaker v. Biddle (Jan., 1926, Kan. Dist.). Criminal. SANBORN, S. C. J., 8th.

11 Fed. 2nd page 156 — Va. Shipbuilding Corp. v. U. S. Shipping Board Emergency Fleet Corp'n (Mar., 1925, E. D. Va.). Accounting Admiralty. WADDILL, S. C. J., 4th.

14 Fed. 2nd page 679 — U. S. ex rel. Johanson v. Phelps (Aug., 1926, Vt. Dist.). Immigration. HOUGH, S. C. J., 2nd.

25 Fed. 2nd page 180 — I. T. S. Rubber Co. v. Essex Rubber Co. (Dec., 1922, Mass. Dist.). Patent. BINGHAM, S. C. J., 1st.

28 Fed. 2nd page 174 — North American Co. v. St. Louis & S. F. R. R. Co. (May, 1926, E. D. Mo.). Reorganization. W. H. SANBORN, S. C. J., 8th.

176 — Cent. Union Trust Co. v. M. K. & T. Ry. Co. (Feb., 1923, E. D. Mo.). Reorganization. W. H. SANBORN, S. C. J., 8th.

37 Fed. 2nd page 730 — Huntington Mfg. Co. v. Bradford (June, 1915, Mass. Dist.). Process question. DODGE, S. C. J., 1st.

47 Fed. 2nd
page 249 U. S. v. One Nash Coupe (Oct., 1930, N. D. Ill.). Customs Duties. ALSCHULER, S. C. J., 7th.

Respectfully submitted,

NATHAN L. MILLER,
Counsel for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, Respondents.

# APPENDIX.

IN THE

## DISTRICT COURT OF THE UNITED STATES,

WITHIN AND FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI.

NORTH AMERICAN COMPANY,
Complainant,

vs.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY,
Defendant.

### ORDER.

On reading and considering the verified bill of complaint in this cause and on motion of counsel for the complainant, and the defendant, the St. Louis and San Francisco Railroad Company, appearing by its counsel and assenting thereto and upon due deliberation, it is ordered, adjudged and decreed as follows:

(1) That the said bill and answer be filed and the prayer of the bill for the appointment of a receiver or receivers in this cause be and the same is hereby granted.

(2) That Thomas H. West and Benjamin L. Winchell be and they are hereby appointed Receivers and invested with the powers of receivers in equity of all the franchises, liens, claims, rights, interests and property of every name and nature either at law or in equity and wherever situated, of the St. Louis and San Francisco Railroad Company, and they

are hereby authorized and directed forthwith to take possession thereof, to preserve, manage, operate and use the same, to run and operate the railroads now held by said Company by lease or otherwise and to conduct the business of said Company according to law and in accordance with the principles, rules and practice in equity in cases of this character. They are authorized to apply to any other court or courts in this Circuit or any other Circuit for ancillary orders to assist them in the exercise of their powers and the discharge of their duties. They are authorized and directed to collect all moneys due and all moneys to become due to said Company, to institute and prosecute such suits in their own names as Receivers or in the name of the Company, as their attorney may advise, to defend such suits as may be brought against them and those now pending or hereafter brought against the Company which affect or may affect the property of which they now are or may become Receivers. They are also authorized with the advice of their attorney to compromise and settle the amounts owing from one party to the other in suits between them and third parties and between the Company and third parties in ordinary cases arising out of the common operation of the Railroad.

(3) Out of the moneys coming to their hands they are authorized to pay, (1) the necessary expenses of operating the railroads and conducting the business during their receivership; (2) the taxes on the property; (3) the following claims incurred within six months preceding the date of this order, the wages and salaries of employes of the Company, the traffic and car mileage balances and accounts for car and equipment repairs.

(4) It is hereby ordered that all persons, firms and corporations in possession of any of the property of which the Receivers are hereby appointed forthwith deliver the same to them or to their representatives or agents.

(5) The Railroad Company and the officers, directors, agents, attorneys and employes thereof, and all other persons claiming to act by virtue of or under said Railroad Company, and all other persons, firms and corporations what-

soever and wheresoever situated, located or domiciled, are hereby restrained and enjoined from interfering with, attaching, levying upon or in any manner whatsoever disturbing any portion of the properties and premises of which Receivers are hereby appointed, or from taking possession of or in any manner interfering with the same or any part thereof, or from interfering in any manner or preventing the discharge by said Receivers of their duties or the operation of said properties and the premises under the order of this Court.

(6) The Receivers shall keep accurate accounts of their receipts and disbursements, take proper vouchers for their disbursements and file with the special master complete bimonthly reports of their receipts and disbursements with the accompanying vouchers. They shall file with him an inventory of the properties coming into their possession as soon as they can conveniently prepare it.

(7) Within ten days from this date each of the said Receivers shall execute a bond with one or more sureties approved by this Court or one of the Judges thereof, in the sum of $100,000 for the benefit of whom it may concern, conditioned that they will well and truly perform the duties of their offices and account for all moneys and properties which may come to their hands and abide by and perform all things which they shall be directed by the Court to do and shall file this bond with the clerk of this Court.

(8) The complainant herein as well as the Receiver may apply to any other Court of competent jurisdiction for such order or orders in the premises as it may deem necessary in aid of the orders issued by this Court.

WALTER H. SANBORN,
*Circuit Judge.*

Filed May 27, 1913,

W. W. NALL,
Clerk.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

---

No. 711 AND No. 721.

---

BENJAMIN F. JOHNSON,
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against

MANHATTAN RAILWAY COMPANY, *et al.*,
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THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

---

IN THE MATTER
OF THE
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

---

*Sirs:*

TAKE NOTICE that the within is a copy of "Communications received from the Senior Circuit Judges in answer to an inquiry, as to their practice in designating themselves to hold District Courts, made by Judge Manton after the opinion of the District Court herein was handed down," which, to-

gether with the originals of said communications, the undersigned will ask leave to present to the Honorable Willis Van Devanter, Associate Justice of the Supreme Court of the United States, for the information of the Court.

Dated, New York, N. Y., April 28, 1933.

NATHAN L. MILLER,
Counsel for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, Respondents.

To:

CHARLES FRANKLIN, Esq.,
Counsel for Petitioner Benjamin F. Johnson.

LOUIS BOEHM, Esq.,
Counsel for Petitioner Lillian Boehm.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1932.

---

No. 711 AND No. 721.

---

BENJAMIN F. JOHNSON,
Petitioner,

against

MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

---

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

---

IN THE MATTER
OF THE
INTERBOROUGH-MANHATTAN RECEIVERSHIP
PROCEEDINGS.

---

**COPIES OF COMMUNICATIONS FROM THE SENIOR CIRCUIT JUDGES IN ANSWER TO AN INQUIRY, AS TO THEIR PRACTICE IN DESIGNATING THEMSELVES TO HOLD DISTRICT COURTS, MADE BY JUDGE MANTON AFTER THE OPINION OF THE DISTRICT COURT HEREIN WAS HANDED DOWN.**

WESTERN UNION

1932 OCT 15 AM 10 02

BA90 19—MANCHESTER NHAMP 15 946 A
JUDGE MARTIN MANTON—

ANSWER DATE FEDERAL BLDG NYK—
TELEGRAM RECEIVED IT HAS BEEN THE PRACTICE IN THIS CIRCUIT I HAVE REPEATEDLY DONT SO AS HAVE MY PREDECESSORS

GEORGE H BINGHAM

---

UNITED STATES CIRCUIT COURT OF APPEALS

THIRD JUDICIAL CIRCUIT

Philadelphia

Chambers of
JUDGE BUFFINGTON

October 18, 1932.

Hon. Martin T. Manton,
U. S. Circuit Judge,
New York City.

My dear Judge Manton:

Your telegram sent to Pittsburgh was delayed in reaching me.

Answering your inquiry I beg to advise you that in cases where there has been no district judge to act and the public interest requires, I have, on occasion, designated myself to sit in a district court. I have no knowledge what my predecessors did in that respect.

Trusting the delay in replying to your telegram has not caused you any inconvenience, I am

Very cordially yours,

JOSEPH BUFFINGTON,
Per E. P.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH JUDICIAL CIRCUIT

Chambers of
JOHN J. PARKER
U. S. Circuit Judge
Richmond, Va.

October 24, 1932.

Hon. Martin T. Manton,
United States Circuit Judge,
Federal Building,
New York City, N. Y.

My dear Judge Manton:

I have just received your night letter which was sent to me under date of October 14th. I was delayed in receiving it by reason of the fact that I have been absent from Charlotte ever since September 27th and have had no one in my office. The Telegraph Company simply delivered the telegram to my office and I knew nothing about it. I have had my mail forwarded here by the mail carrier in the Federal Building, but he does not enter my office and probably did not know that there was a telegram there for me. My law clerk returned to Charlotte Saturday and found the telegram and sent it to me at once. I am answering immediately upon receiving it, but am writing instead of telegraphing because I feel sure that so much time has elapsed that a telegram would not be of any special benefit and a letter can cover the points more fully.

I will say in answer to your telegram that in this Circuit the custom is for the Senior Circuit Judge to assign himself for work in the District Courts whenever in his opinion the public interest so requires. Senior Circuit Judges Pritchard, Woods and Waddill assigned themselves many times. I have had occasion to assign myself only once. I am asking the Clerk of our Court to write you giving a list of the designations made by the Senior Circuit Judges in which they have assigned themselves for work in the District Court.

In talking with the Clerk of our Court, Mr. Claude M. Dean, with regard to the matter, he tells me that at the time Judge Woods became Senior Judge of this Circuit a question

arose as to his power to designate himself to act as District Judge and that he took the matter up by correspondence with the Chief Justice. Mr. Dean thinks that the Chief Justice at the time was Chief Justice White, although it may have been Chief Justice Taft. The Chief Justice advised him that there was no necessity for bothering the Chief Justice with requests to designate him to sit in the District Court, but that he should proceed to designate himself whenever in his opinion such designation was proper. I know that since my appointment to the bench Judge Waddill has designated himself a number of times to hold courts in the Eastern and Western Districts of Virginia. I succeeded Judge Waddill as Senior Judge of the Circuit, but I have had occasion to designate myself only once. Last year Judge Webb was in the midst of an important trial at Asheville when his Shelby term was scheduled to open. I designated myself as District Judge for the Western District of North Carolina and proceeded to Shelby and opened the court.

As indicated above, I have asked the Clerk to send you a list of the designations which the Senior Circuit Judges have made, and you will doubtless receive same at an early date. I am very sorry indeed that I did not receive your telegram promptly, and you can rest assured that had I done so you would have received a prompt answer.

If there is any further information I can give you with respect to the matter, I shall be glad to do so.

With kindest regards, I am

Sincerely yours,

JJP/B JOHN J. PARKER.

CLERK'S OFFICE

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

Richmond, Virginia,
October 24, 1932.

Hon. Martin T. Manton,
U. S. Circuit Judge,
New York, N. Y.

My dear Judge:

At the direction of Senior Circuit Judge Parker, I have prepared and herewith enclose, statement showing designations by Senior Circuit Judges, designating themselves to hold District Courts in the Fourth Circuit. According to my records, this is a complete list of all such designations in this circuit.

With high personal esteem, I am,

Respectfully,

CLAUDE M. DEAN,
Clerk.

DtoW.
Enclosure.

---

STATEMENT ENCLOSED BY CLAUDE M. DEAN, CLERK, U. S. CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

---

DESIGNATIONS OF SENIOR CIRCUIT JUDGES, BY THEMSELVES, TO HOLD DISTRICT COURTS.

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Apr. 7, 1925 Senior Circuit Judge Woods designated self to hold District Court at Norfolk, Va.

May 4, 1925 Senior Circuit Judge Woods designated self to hold District Court at Roanoke, Va.

| | |
|---|---|
| July 31, 1925 | Senior Circuit Judge Waddill designated self to hold District Court for Eastern District of North Carolina. |
| Feb. 23, 1926 | Senior Circuit Judge Waddill designated self to hold District Court at Norfolk, Va. |
| Mar. 30, 1926 | Senior Circuit Judge Waddill designated self to hold District Court at Richmond, Va. |
| June 3, 1926 | Senior Circuit Judge Waddill designated self to hold District Court at Norfolk, Va. |
| Aug. 3, 1926 | Senior Circuit Judge Waddill designated self to hold District Court at Huntington, W. Va. |
| Nov. 16, 1926 | Senior Circuit Judge Waddill designated self to hold District Court at Norfolk, Va. |
| Jan. 17, 1927 | Senior Circuit Judge Waddill designated self to hold District Court at Norfolk, Va. |
| Jan. 29, 1927 | Senior Circuit Judge Waddill designated self to hold District Court for Western District of Virginia. |
| Sept. 6, 1927 | Acting Senior Circuit Judge Parker designated self to hold District Court at Norfolk, Va. |
| Mar. 30, 1928 | Senior Circuit Judge Waddill designated self to hold District Court at Norfolk, Va. |
| Aug. 23, 1928 | Senior Circuit Judge Waddill designated self to hold District Court at Norfolk, Va. |

Aug. 13, 1928 **Senior Circuit Judge Waddill designated self to hold District Court at Norfolk, Va.**

Dec. 2, 1929 **Senior Circuit Judge Waddill designated self to hold District Court for Eastern District of North Carolina.**

Sept. 24, 1931 **Senior Circuit Judge Parker designated self to hold District Court at Shelby, N. C.**

---

WESTERN UNION

1932 OCT 15 AM 11 22

VEA 68 40 DL GOVT—LOUISVILLE KY 15 1007A

HONORABLE MARTIN T MANTON
UNITED STATES CIRCUIT JUDGE FEDERAL BUILDING NYK

JUDGE DENISON DID IT IN KENTUCKY CASE AND AFTER THE APPOINTMENT OF SPECIAL MASTER DESIGNATED A DISTRICT JUDGE THE REGULAR JUDGE BEING DISQUALIFIED STOP I AM DESIGNATING MYSELF IN TENNESSEE CASE THIS WEEK THE JUDGE FOR THE DISTRICT BEING DISQUALIFIED

CHAS H MOORMAN

---

WESTERN UNION

1932 OCT 15 PM 12 26

CD54 46 GOVT—CHICAGO ILL 15 1113A

HON MARTIN T MANTON UNITED STATES CIRCUIT JUDGE
FEDERAL BLDG NYK

EVER SINCE I HAVE BEEN JUDGE SENIOR CIRCUIT JUDGE HAS FROM TIME TO TIME ASSIGNED HIMSELF THE SAME AS OTHER CIRCUIT JUDGES TO SIT IN DISTRICT COURTS FOR YEARS IT HAS BEEN CUSTOM TO ASSIGN HIMSELF AND COLLEAGUES FOR EACH TERM OF DISTRICT COURT AT CHICAGO

SAMUEL ALSCHULER

WESTERN UNION

1932 OCT 15 AM 11 34

RXKC129 34 GOVT—KANSASCITY MO 15 1029A

HON MARTIN T MANTON
SENIOR U S CIRCUIT JUDGE NYK

WIRE RECEIVED IT WAS THE CUSTOM OF JUDGE SANBORN AND HAS BEEN MY CUSTOM TO MAKE ASSIGNMENTS OF OURSELVES TO DISTRICT COURT WHENEVER NECESSARY STOP THIS HAS BEEN PARTICULARLY SO IN CASE OF RECEIVERSHIPS

KIMBROUGH STONE

---

WESTERN UNION

1932 OCT 15 PM 3 14

B187 56 GOVT—GA SANFRANCISCO CALIF 15 1202P

HON M T MANTON U S CIRCUIT JUDGE
FEDERAL BLDG NEWYORK NY

THE CLERK INFORMS ME IT WAS NOT THE PRACTICE OF MY PREDECESSOR JUDGE GILBERT TO ASSIGN HIMSELF TO THE DISTRICT COURT STOP I HAVE DONE SO ONCE AT THE REQUEST OF A DISTRICT JUDGE AND ONCE WHERE THE DISTRICT JUDGE WAS ABSENT AND AN EXTENSION OF TIME WAS NECESSARY TO PRESERVE THE RIGHTS OF THE PARTIES

CURTIS D WILBUR

WESTERN UNION

1932 OCT 15 PM 12 38

VB84 20 GOVT COLLECT—DENVER COLO 15 1030A

HON M T MANTON
US CIRCUIT JUDGE NYK

SINCE TENTH CIRCUIT ESTABLISHED HAVE OCCASION TO ASSIGN MYSELF ONCE TO HEAR CASE IN DISTRICT COURT STOP NO PREDECESSOR

ROBT E LEWIS

Respectfully submitted,

NATHAN L. MILLER,
Counsel for Victor J. Dowling and Thomas E. Murray, Jr., Receivers of Interborough Rapid Transit Company, Respondents.

# RESPONDENT'S BRIEF

FILE COPY

MAR 1 1

CHARLES

IN THE

# Supreme Court of the United States

OCTOBER TERM—1932.

Nos. 711 and 721.

BENJAMIN F. JOHNSON,
*Petitioner,*

*against*

MANHATTAN RAILWAY COMPANY, *et al.*,
*Respondents.*

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
*Respondent,*

*against*

INTERBOROUGH RAPID TRANSIT COMPANY,
*Respondent.*

IN THE MATTER

*of*

The INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

## BRIEF OF RESPONDENT THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY IN OPPOSITION TO PETITIONS OF BENJAMIN F. JOHNSON AND LILLIAN BOEHM FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BREED, ABBOTT & MORGAN,
*Counsel for Respondent The American Brake Shoe and Foundry Company,*
15 Broad Street,
New York, N. Y.

CHARLES H. TUTTLE,
PARIS S. RUSSELL,
W. K. PETIGRUE,
*Of Counsel.*

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IN THE

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NOS. 711 AND 721.

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IN THE MATTER
*of*
THE INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

## BRIEF OF RESPONDENT THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY IN OPPOSITION TO PETITIONS OF BENJAMIN F. JOHNSON AND LILLIAN BOEHM FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

### Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 1024) is reported in 61 Fed. (2d) 934 (Advance Sheets of January 23, 1933). The opinion of Judge Woolsey in the District Court (R. 694) is reported in 1 Fed. Supp. 809 (Advance Sheets of January 9, 1933).

## Statement of Facts.

On June 29, 1932, the eight appointed Judges of the United States District Court for the Southern District of New York adopted two "rules" called Rule 1-a and Rule 11-a* and undertook to add them to the General Rules of the District Court for that District. *These two "rules" were never concurred in by a majority of the Circuit Judges of the Second Judicial Circuit* (R. 714).

On August 25, 1932, Judge Manton signed an order pursuant to the provisions of Sections 22 and 23 of Title 28 of the United States Code (Judicial Code, Sections 18 and 19), in which he found that the public interest required that a Circuit Judge be designated to hold a District Court within such Circuit, and designated and assigned himself to hold such Court during the period beginning August 25, 1932, and particularly to hear and determine all applications and proceedings in the suit of The American Brake Shoe and Foundry Company *vs.* Interborough Rapid Transit Company (R. 177). This order is hereinafter referred to as the "Designation Order," and was filed on August 26, 1932 (R. 178).

On the same day Judge Manton made an order with respect to the division of business in the District Court for

---

* Rule 1-a. Any judge designated to sit in the District Court for the Southern District of New York shall do such work only as may be assigned to him by the Senior District Judge.

Rule 11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the bankruptcy rules), shall be made to the judge assigned to hold the bankruptcy and motion part of the business of the court and to no other judge.

the Southern District of New York (R. 178), in which order he expressed his dissent from "Rules" 1-a and 11-a. This order is referred to hereinafter as the "Division of Business Order," and was filed on August 26, 1932 (R. 179).

On August 26, 1932, the bill of complaint in the Brake Shoe suit (R. 153) was filed. The bill was in the nature of a creditor's bill and prayed, among other things, for the appointment of a receiver or receivers for respondent Interborough Rapid Transit Company. On the same day Interborough answered and admitted all the allegations of said bill of complaint and consented to the appointment of a receiver or receivers (R. 171).

Also, on August 26, 1932, an order was made by Judge Manton, as a Circuit Judge designated to hold a District Court for the Southern District of New York, appointing Hon. Victor J. Dowling and Thomas E. Murray, Jr., Esq., temporary receivers of Interborough and its property (R. 180). This order further directed the parties to the suit to show cause on September 22, 1932, why the receivership should not be continued during its pendency, *and also directed that upon the hearing thereon any other creditor of defendant or other party in interest might be heard.*

On September 6, 1932, Judge Manton made an order in the Brake Shoe suit, upon the petition of Manhattan, in which he ordered that Manhattan be made a party defendant in said suit and appointed William Roberts temporary receiver of Manhattan (R. 196). This order contained a similar provision for a hearing of any person in interest on September 22, 1932.

On September 22, 1932, Judge Manton heard arguments as to the continuation of the Interborough and Manhattan

receiverships during the pendency of the Brake Shoe suit, *at which hearings neither of the petitioners appeared or interposed any claim or objection to the proceedings or their conduct,* although it is clear that they had actual prior notice thereof, since the Johnson bill of complaint and the Boehm petition for intervention, which are hereinafter referred to, were filed prior to the date fixed for such hearings (R. 5). On September 28, 1932, Judge Manton made an order continuing said receiverships during the pendency of the Brake Shoe suit (R. 223).

Since the commencement of the Brake Shoe suit many administrative orders have been made from time to time by Judge Manton (R. 191, 189, 193, 201, 221, 214, 226).

The suit of Benjamin F. Johnson *v.* Manhattan Railway Company, the first above entitled cause, which is referred to hereinafter as the Johnson suit, was begun on September 20, 1932. Johnson's bill of complaint asserts lack of jurisdiction in Judge Manton because of non-compliance with "Rules" 1-a and 11-a.

Thereafter petitioner Lillian Boehm intervened in the Johnson suit as a party plaintiff (R. 137) and filed a "supplemental" bill of complaint (R. 80) in the nature of a creditor's bill to which were added allegations similar to those contained in bill of complaint of petitioner Johnson.

*Both petitioner Boehm and petitioner Johnson in their respective bills of complaint in the Johnson suit alleged that the appointment of receivers for Interborough was imperative* (R. 286, 24). Their claim was that the receivers should be appointed by some other Judge than Judge Manton (R. 1024). The whole controversy which they are pressing involves in practical effect only this point.

Judge Woolsey, after hearing on October 4, 1932, and October 6, 1932, arguments on motions brought on in the Johnson suit by three orders to show cause (R. 114, 123 and 130) and rendering an opinion thereon on October 13, 1932 (R. 694), made on October 18, 1932, the so-called Consolidation Order (R. 722) and the so-called Vacating Order (R. 725).

In the Vacating Order Judge Woolsey vacated all orders in the Brake Shoe suit signed by Judge Manton on or after August 26, 1932, but specifically refused for want of jurisdiction to vacate the Designation Order and the Division of Business Order signed by Judge Manton on August 25, 1932 (R. 728-729).

Judge Woolsey's orders have been reversed by the Circuit Court of Appeals.

## Summary of Argument.


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| I. | The Designation Order made by the Senior Circuit Judge was a valid exercise of power.... | 7 |
| II. | "Rules" 1-a and 11-a are invalid for all purposes; and, in any event, they were not binding upon Judge Manton as a Circuit Judge designated to hold a District Court..... | 11 |
| III. | Judge Woolsey had no power to vacate orders made by Judge Manton in the Brake Shoe suit for the further reasons (1) that Judge Manton's status in that suit was at least that of a judge *de facto*, and (2) that the orders made by Judge Manton in the Brake Shoe suit were not open to collateral attack.... | 17 |

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| IV. | Judge Woolsey's lack of power to make any order in the Johnson suit vacating Judge Manton's orders in the Brake Shoe suit was not affected by the Consolidation Order, since even if the Consolidation Order were proper it could not result in merging the two suits into one cause | 20 |
| V. | In addition, a disregard of a rule of Court merely directory or regulating practice or assigning business as between judges, does not affect the jurisdiction of the Court itself and cannot subject the orders of the Court to collateral attack,—especially where the parties to the cause have waived the application of the rule | 22 |
| VI. | By Judge Manton's order appointing receivers, the complainants were extended an opportunity to present in the Brake Shoe case itself the so-called jurisdictional points which they are now urging | 23 |

# ARGUMENT.

## POINT I.

**The Designation Order made by the Senior Circuit Judge was a valid exercise of power. Judge Woolsey, as his order expressly recognized, had no jurisdiction to vacate it or to review or reverse its finding and declaration that the public interest required its making. No appeal was taken by either Johnson or Boehm from Judge Woolsey's denial of their motion to vacate this order.**

### A.

### *Sections 22 and 23.

Section 22 of Title 28 of the United States Code (Judicial Code, Section 18) so far as material, reads as follows:

> "The Chief Justice of the United States, or the circuit justice of any judicial circuit, or the senior circuit judge thereof, may, *if the public interest requires*, designate and assign any circuit judge of a judicial circuit to hold a district court within such circuit . . .
>
> "During the period of service of any judge designated and assigned under this chapter, he shall have all the powers, and rights, and perform all the duties, of a judge of the district, or a justice of the court, to which he has been assigned (excepting the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds)." (Italics ours.)

---

* When reference is made in this brief to Section 13, Section 22, Section 23, Section 27, Section 730 or Section 731, the reference is to Title 28 of the United States Code unless otherwise specified.

Section 23 of Title 28 of the United States Code (Judicial Code, Section 19) reads as follows:

> "It shall be the duty of the district or circuit judge who is designated and appointed under either of sections 17 to 22 of this title, to discharge all the *judicial duties for which he is so appointed,* during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, *in pursuance of said provisions,* shall have the same effect and validity as if done by or before the district judge of the said district." (Italics ours.)

**B.**

**The Designation Order and Judge Woolsey's acknowledgment of lack of jurisdiction to vacate it.**

The Designation Order of August 25, 1932, contains a specific finding that "the public interest" required its making (R. 177). That finding was beyond review and must be deemed valid. The power to make it is committed to the Chief Justice, the Justice of the Circuit, and the Senior Circuit Judge *alone.* The statute does not require a recital of reasons.

Moreover, both Courts below have expressly refused to reverse this determination as to the "public interest" (R. 728, 1032). This finding of fact therefore cannot be challenged in this Court by the *ex parte* assertions to the contrary by these petitioners.

Judge Woolsey in the Vacating Order *denied,* "for want of jurisdiction," the motions of the petitioners herein in so far as they sought to have the Designation Order and the Division of Business Order vacated (R. 728-729). *From*

*this provision of Judge Woolsey's order no appeal was taken by either of the present petitioners.*

Surely, Judge Manton's power to make that order implies the power to carry it into effect and, therefore, includes the power to make the subsequent orders which petitioners have attempted to have set aside in a collateral proceeding.

Chaos would result if the Circuit Judge sitting under designation of the Senior Circuit Judge could be declared "a mere usurper" by a District Judge at the instance of a litigant who denied the existence of the "public interest" found and declared by the Senior Circuit Judge.

## C.

**Under Sections 22 and 23 designation may be made for the "discharge of all the judicial duties" in a particular suit.**

Section 22 is not limited in any way to a public interest arising from congestion of calendar, or shortage of judges, or illness, absence, or disqualification of judges, or the nature or quantity of specific business which may be before the Court.

Since Congress has expressly imposed these powers and duties upon the judge authorized to designate and upon the judge designated, no authority rests in the District Judges to veto, limit, restrict or question their exercise by the judge designating or the judge designated.

Section 23 specifically makes it the duty of a judge so designated "to discharge all the judicial duties *for which he is so appointed*, during the time for which he is so appointed." (Italics ours.) This expressly contemplates that

a judge may be designated to discharge *specific* judicial duties.

That the public interest referred to in Section 22 and similar statutes may properly center in a specific case, see:

*U. S. ex rel. Fehsenfeld* v. *Gill*, 292 Fed. (C. C. A., 4th, 1923) 136;

*People ex rel. S. L. & T. Co.* v. *Supreme Court*, 220 N. Y. 487, 491.

**D.**

**Sections 22 and 23 have been universally interpreted by the judiciary to authorize the designation of a Circuit Judge to take jurisdiction over a particular suit or a particular class of business.**

The validity of a designation by the Senior Circuit Judge of himself and of inclusion in such designation of a specific case or subject matter rests, as shown by the instances cited in the affidavit of Mr. J. Osgood Nichols (R. 553-572, 655-662), and, as this Court knows from familiar judicial history, upon ample and repeated precedents established not only by the Senior Circuit Judges of the Second Judicial Circuit but by the Senior Circuit Judges in nearly every Circuit of the United States. A notable instance is *Pennsylvania Steel Co.* vs. *New York City Ry. Co.*, 221 Fed. 440, where Senior Circuit Judge Lacombe upheld the validity of the designation which he had made of himself under Sections 22 and 23 "to hold the district court in all matters pertaining to the above cause."

E.

**"Rules" 1-a and 11-a cannot veto, or subordinate to the judgment of other judges, the exclusive statutory powers conferred by Sections 22 and 23.**

> "No rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law."
>
> *Washington-Southern Co.* v. *Baltimore Co.*, 263 U. S. 629, 635.

How could the Chief Justice, a Circuit Justice or a Senior Circuit Judge effectuate his finding of the requirements of the public interest if, under "Rule" 1-a, the Senior District Judge refused to assign the designated circuit judge to any work, or assigned him only to work having no relation to the public interest in furtherance of which he was appointed; or if, under "Rule" 11-a, the designated Circuit Judge was prohibited from functioning in the very matter with respect to which such public interest existed?

## POINT II.

**Moreover, "Rules" 1-a and 11-a are invalid for all purposes; and, in any event, they were not binding upon Judge Manton as a Circuit Judge designated to hold a District Court.**

Section 731 of Title 28 of the United States Code provides as follows:

> "Rules of Practice in District Courts. The district courts may, from time to time, and in any manner not inconsistent with any law of the United

States, or with any rule prescribed by the Supreme Court under section 730 of this title, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings" (R. S., §918).

Section 730 of Title 28 of the United States Code, referred to in the foregoing Section 731, provides as to equity and admiralty causes as follows:

> "REGULATION OF PRACTICE OF DISTRICT COURTS BY SUPREME COURT. The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, *of proceeding to obtain relief*, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, *and generally to regulate the whole practice*, to be used, in suits in equity or admiralty, by the district courts" (R. S., §917). (Italics ours.)

Supreme Court Equity Rule 79 provides as follows:

> "Rule 79. ADDITIONAL RULES BY DISTRICT COURT. —*With the concurrence of a majority of the Circuit Judges* for the circuit, the District Courts may make any other and further rules and regulations *for the practice, proceedings and process*, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same." (Italics ours.)

## A.

**"Rules" 1-a and 11-a, if rules at all, are rules governing practice, proceedings and/or process in equity, and are invalid since they have not been concurred in by a majority of the Circuit Judges in conformity with Supreme Court Equity Rule 79.**

(1) The official title of this Court's formulation of rules under Section 730 is "Equity Rules of *Practice*"; and the comprehensive character of this formulation is shown by final Equity Rule 81, which declares:

> "These Rules shall be in force on and after February 1, 1913 and shall govern *all proceedings* in cases then pending or thereafter brought." (Italics ours.)

(2) It is quite true that the Equity Rules do not specifically set forth a practice for each proceeding in an equity cause. They themselves expressly recognize a residuum of subject matter not covered by the specific rules; and as to that residuum they provide in Rule 79 that, *with the concurrence of a majority of the Circuit Judges,* the district courts

> "may make any other further rules and regulations for the *practice, proceedings and process, mesne and final,* in their respective districts, not inconsistent with the rules hereby prescribed." (Italics ours.)

(3) "Rule" 1-a in so far as it purports to limit the exercise of equity jurisdiction by a *designated* judge, and "Rule" 11-a in so far as it purports to tell one seeking the appointment of equity receivers, where and before whom to apply, clearly affect not only the "practice," but also "pro-

ceedings," in an equity cause and also affect mesne "process" in an equity cause. Hence they fall squarely within Equity Rules 79 and 81 and therefore within the requirement that there should be *concurrence by a majority of the Circuit Judges.*

Furthermore, "Rule" 11-a purports to govern a "mode of proceeding to obtain relief" in equity (*to wit*, the mode of proceeding to obtain the relief of the appointment of a receiver in equity), and therefore by the very terms of Section 730 purports to be a rule in equity. (*Horn* v. *Pere Marquette R. Co.*, 151 Fed. 626, 634, 636.)

(4) Judge Woolsey makes the astonishing statement that "practice in equity in receivership cases only commences *after* the making of the order of appointment" (R. 714). An application in equity for the appointment of a receiver is "interlocutory" and "presupposes a pending case." (*Horn* v. *Pere Marquette R. Co.*, 151 Fed. 626, 634.)

**B.**

**"Rules" 1-a and 11-a are also inconsistent with other provisions of substantive law.**

(1) They are inconsistent with Section 13, Title 28, of the United States Code (Section 9 of the Judicial Code), which provides that District Courts as courts of equity "shall be deemed always open" and "*any* district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court."

(2) They are inconsistent with Rule 6 of the Equity Rules established by this Court, which provides that the judge may "at any time or place" "make and direct all interlocutory orders," etc.

(3) They are inconsistent with Sections 22 and 23 of Title 28 of the United States Code. (See Point I hereof, *supra.*)

## C.

**If it be contended that "Rules" 1-a and 11-a were authorized by Section 27 of Title 28 of the United States Code, they could have no binding effect upon Judge Manton who in no way participated in their adoption and who derived his power under Sections 22 and 23.**

Section 27 of Title 28 of the United States Code (Judicial Code Section 23) reads as follows:

> "DISTRICT WITH MORE THAN ONE JUDGE; DIVISION OF BUSINESS. In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district."

(1) Petitioners urge that "Rules" 1-a and 11-a obtained authority from Section 27.

Judge Woolsey, however, stated in his opinion, that it was pursuant to the power vested in the District Court by Section 731 that it had made and promulgated these "Rules" (R. 713).

He expressly conceded that they "are not to be supported under that particular Section" (Section 27) (R. 888-890). They do not represent any temporary or periodical agreement between particular judges for the division of business among themselves but constitute an attempt to permanently regulate the "practice."

(2) Moreover, it is quite obvious that "Rules" 1-a and 11-a cannot, as Judge Woosey thus conceded, be deemed authorized by Section 27.

Any such construction would result in the right of the *regularly appointed* district judges to strip any designated judge, whether appointed by the Chief Justice, the Circuit Justice or the Senior Circuit Judge, of all powers.

Certainly Section 2[illegible] cannot be so construed as to be inconsistent with Sections 22 and 23 and the prior sections of Title 28 of the United States Code giving powers to judges designated pursuant thereto.

## POINT III.

**Judge Woolsey had no power to vacate orders made by Judge Manton in the Brake Shoe suit for the further reasons (1) that Judge Manton's status in that suit was at least that of a judge *de facto* and his acts as such could not be reviewed in the Johnson suit or by a judge of coordinate jurisdiction, and (2) that the orders made by Judge Manton in the Brake Shoe suit were not open to collateral attack.**

**"Rules" 1-a and 11-a, if they can have any validity at all, are merely directory. They cannot render Judge Manton a mere "usurper."**

We submit that Judge Manton was, for all of the purposes of the Brake Shoe suit, a *de jure* judge; but in any event he was, for the purposes of that suit, at least a *de facto* judge.

(1) In the Brake Shoe suit the status of Judge Manton had back of it the following predicates:

> (a) A statute authorizing the Senior Circuit Judge of a Circuit to designate and assign any Circuit Judge of his Circuit to hold a District Court within his Circuit, if the public interest requires, and giving to a Circuit Judge so designated "all the powers and rights" of a judge of the district and requiring him to perform all the duties of such a judge (Section 22).
>
> (b) A judge acting as a Senior Circuit Judge in the Second Judicial Circuit and duly authorized so to act.

(c) A duly made order of such Senior Circuit Judge containing a finding that the public interest required that Judge Manton be designated and assigned as a Circuit Judge to hold a District Court within the Second Circuit and designating and assigning Judge Manton to hold a District Court for the Southern District of New York and particularly to hear and determine all applications and proceedings in the Brake Shoe suit (the Designation Order). The application of plaintiffs in the Johnson suit for the vacation of this order was denied by Judge Woolsey himself for want of jurisdiction and that portion of his order was never appealed from by the present petitioners (R. 728-9).

(d) A statute which provides that it shall be the duty of any Circuit Judge so designated "to discharge all the judicial duties for which he is so appointed" (Section 23).

(e) A suit (the Brake Shoe suit) over which, and over the subject matter of which, the District Court for the Southern District of New York had competent jurisdiction by reason of the necessary diversity of citizenship and the amount involved. Judge Woolsey in his opinion found this to be a fact (R. 712).

(f) Parties over whom in said suit the District Court for the Southern District of New York had personal jurisdiction. Judge Woolsey found this to be the fact in his opinion (R. 712).

(g) A consent by all the parties to said suit to the jurisdiction of Judge Manton in the suit.

(h) Judicial action taken by Judge Manton in the Brake Shoe suit pursuant to the provisions of the Designation Order.

All the conditions required to constitute Judge Manton at least a *de facto* judge in the Brake Shoe suit are present, *i. e.*, a duly constituted court, a duly instituted suit, jurisdiction in the court over the subject matter and the parties, and the exercise therein by Judge Manton, acting and purporting to act as judge of the court, of judicial powers under color of the direction and authority contained in the Designation Order and of Sections 22 and 23 of Title 28 of the United States Code.

(2) The status of a *de facto* judge cannot be attacked collaterally either in the suit in which he is acting or in any other suit. His right to hold his office can be questioned only in proceedings, regularly instituted for that purpose, to which he is a party, in the form provided by law.

*Ball* v. *United States*, 140 U. S. 118 (1891);
*McDowell* v. *United States*, 159 U. S. 596 (1895);
*State ex rel. Buisson* v. *Lazarus*, 33 La. Ann., 1425;
*Luhrig Collieries Co.* v. *Interstate Coal & Dock Co.*, 287 Fed. 711 (C. C. A., 2nd, 1923);
33 *Corpus Juris*, 933.

(3) *Case* v. *United States*, 14 Fed. (2d) 510, decided by the Circuit Court of Appeals for the Eighth Circuit and cited by Judge Woolsey in his opinion, is readily distinguishable. See discussion (R. 1031) in Circuit Court of Appeals opinion.

## POINT IV.

**Judge Woolsey's lack of power to make any order in the Johnson suit vacating Judge Manton's orders in the Brake Shoe suit was not affected by the Consolidation Order, since even if the Consolidation Order were proper it could not result in merging the two suits into one cause. The independent and separate existence of the two suits could not be affected by consolidation.**

**Moreover, Judge Woolsey could not do by indirection what he could not do by direction. Since he had no power in the Johnson suit to vacate orders in the Brake Shoe suit, he could not clothe himself with such power by forcibly reaching over into Judge Manton's court and possessing himself of the Brake Shoe suit by the alleged process of consolidation.**

(1) The consolidation by Judge Woolsey of the Brake Shoe suit and the Johnson suit, even if effective, did not accomplish a merger of the two suits.

Since the suits remained separate and independent, an attempt in one of them to attack proceedings in the other is a collateral attack.

*Toledo, etc., R. R. Co.* v. *Continental Trust Co.*, 95 Fed. 497 (C. C. A. 6th, 1899) (certiorari denied 176 U. S. 219);

*Taylor* v. *Logan Trust Company*, 289 Fed. 51 (C. C. A. 8th, 1923);

*Nolte* v. *Hudson Nav. Co.*, 11 Fed. (2d) 680 (C. C. A. 2d, 1926);

*Adler* v. *Seaman,* 266 Fed. 828 (C. C. A. 8th, 1920);

*Mutual Life Insurance Co.* v. *Hillmon,* 145 U. S. 285;

1 *Corpus Juris,* 1137.

(2) The orders of Judge Manton were, as we have shown in Point III, valid whether or not Judge Manton was a *de jure* or *de facto* judge. Their validity as such was no less after than before the attempted consolidation.

(3) Furthermore, applying Judge Woolsey's own reasoning, his action was a violation of Equity Rule 4 of the Southern District of New York. This Rule provides, among other things:

> "In any suit in which a receiver is appointed the Judge who appoints the receiver shall retain supervision over the cause, including appointment of solicitors and applications for allowance."

This Rule had been submitted by the district judges to the circuit judges for approval in accordance with Supreme Court Equity Rule 79, and had been approved by the circuit judges.

## POINT V.

**In addition, a disregard of a rule of Court merely directory or regulating practice or assigning business as between judges, does not affect the jurisdiction of the Court itself and cannot subject the orders of the Court to collateral attack—especially where the parties to the cause have themselves waived the application of the rule.**

(1) A party to a cause may waive even his constitutional rights as to practice and procedure in the conduct of a cause. *A fortiori,* where disregard by both parties of a rule of practice creates at most a mere irregularity, such irregularity does not make null and void the jurisdiction of the court.

*Abbott* v. *Brown,* 241 U. S. 606 (1916);
*Lively* v. *Picton,* 218 Fed. 401;
*Payne* v. *Garth,* 285 Fed. (C. C. A., 8th) 301 (1922);
*People ex rel. Childs* v. *Extraord. Trial Term,* 228 N. Y. 263.

(2) The opinion of the Circuit Court of Appeals (R. 1029 *et seq.*) amply demonstrates that "Rules" 1-a and 11-a were (if valid at all) directory and their disregard was at most no more than error.

## POINT VI.

**The question as to whether the complainants would have any means of reviewing the validity or propriety of Judge Manton's order appointing receivers is really irrelevant; but, even if this were otherwise, the complainants were extended by that very order an opportunity to present to him the so-called jurisdictional points which they are now urging. They were thereby furnished a forum, the privileges of which they neglected to utilize; and any adverse determination by Judge Manton they could have presented in the Circuit Court of Appeals for review.**

(1) In the very order by which Judge Manton appointed temporary receivers of Interborough on August 26, 1932, and in his subsequent order on September 6, 1932, appointing a temporary receiver for Manhattan, he designated September 22, 1932, as a date when any creditor of either of these defendants or any "other party in interest" might show cause before him "why the receivership should not be continued" (R. 184, 200). These orders were known to Johnson and Boehm before September 22, 1932, because the Johnson bill of complaint, which refers to them, and the Boehm intervention were filed prior thereto.

This order in no way required the persons who responded thereto on the date fixed to become parties to the action or even to intervene. It expressly empowered and invited them on special or other appearance to present any reason whatever why Judge Manton should terminate or annul the receivership.

(2) There is nothing in Equity Rule 37 which would prevent an appeal by a person who so presented himself in

response to the invitation tendered in Judge Manton's aforesaid orders to show cause.

Courts of equity frequently permit parties to appear for the special purpose of being heard upon particular questions without becoming parties to the suit or without a general intervention under Equity Rule 37 which clearly contemplates intervention as a party.

*Mitchell* v. *Lay*, 48 Fed. (2nd) (C. C. A. 9), 79, 84, 85;

*Blake* v. *District Court*, 59 Fed. (2nd) (C. C. A. 9) 78, 79;

*Kingsport Press, Inc.* v. *Brief English Systems*, 54 Fed. (2nd) 497;

*Wood* v. *Oregon Development Co.*, 55 Fed. 901;

*Christian* v. *Hoe, Inc.*, decided by the Circuit Court of Appeals, 2nd Circuit, February 20, 1933, but not yet reported.

## CONCLUSION.

**For the foregoing reasons the petitions for writs of certiorari should be denied.**

Dated New York, N. Y., March 7, 1933.

Respectfully submitted,

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CHARLES H. TUTTLE,
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APR 17

IN THE

# Supreme Court of the United States

OCTOBER TERM—1932.

NOS. 711 AND 721.

BENJAMIN F. JOHNSON,
*Petitioner,*

*against*

MANHATTAN RAILWAY COMPANY, *et al.*,
*Respondents.*

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
*Respondent,*

*against*

INTERBOROUGH RAPID TRANSIT COMPANY,
*Respondent,*

IN THE MATTER

*of*

The INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

## BRIEF OF RESPONDENT THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY.

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IN THE MATTER
*of*
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## BRIEF OF RESPONDENT THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY.

### Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 1024) is reported in 61 Fed. (2d) 934 (Advance Sheets of January 23, 1933). The opinion of Judge Woolsey in the District Court (R. 694) is reported in 1 Fed. Supp. 809 (Advance Sheets of January 9, 1933).

### Statement of Facts.

On June 29, 1932, the eight appointed Judges of the United States District Court for the Southern District of

New York adopted two "rules" called Rule 1-a and Rule 11-a* and undertook to add them to the General Rules of the District Court for that District. *These two "rules" were never concurred in by a majority of the Circuit Judges of the Second Judicial Circuit* (R. 714).

On August 25, 1932, Judge Manton signed an order pursuant to the provisions of Sections 22 and 23 of Title 28 of the United States Code (Judicial Code, Sections 18 and 19), in which he found that the public interest required that a Circuit Judge be designated to hold a District Court within such Circuit, and designated and assigned himself to hold such Court during the period beginning August 25, 1932, "and particularly to hear and determine all applications and proceedings" in the suit of The American Brake Shoe and Foundry Company *vs.* Interborough Rapid Transit Company (R. 177). This order is hereinafter referred to as the "Designation Order," and was filed on August 26, 1932 (R. 178).

On the same day Judge Manton made an order with respect to the division of business in the District Court for the Southern District of New York (R. 178), in which order he expressed his dissent from "Rules" 1-a and 11-a. This order is referred to hereinafter as the "Division of Business Order," and was filed on August 26, 1932 (R. 179).

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* Rule 1-a. Any judge designated to sit in the District Court for the Southern District of New York shall do such work only as may be assigned to him by the Senior District Judge.

Rule 11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the bankruptcy rules), shall be made to the judge assigned to hold the bankruptcy and motion part of the business of the court and to no other judge.

On August 26, 1932, the bill of complaint in the Brake Shoe suit (R. 153) was filed. The bill was in the nature of a creditor's bill and prayed, among other things, for the appointment of a receiver or receivers for respondent Interborough Rapid Transit Company. On the same day Interborough answered and admitted (as it was bound to do) all the allegations of the bill of complaint and consented to the appointment of a receiver or receivers (R. 171).

Also, on August 26, 1932, an order was made by Judge Manton, as a Circuit Judge designated to hold a District Court for the Southern District of New York, appointing Hon. Victor J. Dowling and Thomas E. Murray, Jr., Esq., temporary receivers of Interborough and its property (R. 180). This order further directed the parties to the suit to show cause on September 22, 1932, why the receivership should not be continued during its pendency, *and also directed that upon the hearing thereon any other creditor of defendant or other party in interest might be heard.*

On September 6, 1932, Judge Manton made an order in the Brake Shoe suit, upon the petition of Manhattan Railway Company, in which he ordered that Manhattan be made a party defendant and appointed William Roberts temporary receiver of Manhattan (R. 196). This order contained a similar provision for a hearing of any person in interest on September 22, 1932.

On September 22, 1932, Judge Manton heard arguments as to the continuation of the Interborough and Manhattan receiverships during the pendency of the Brake Shoe suit, *at which hearings neither of the petitioners appeared or interposed any claim or objection to the proceedings or their conduct,* although it is clear that they had actual prior

notice thereof, since the Johnson bill of complaint and the Boehm petition for intervention, which are hereinafter referred to, were filed prior to the date fixed for such hearings (R. 5). The Johnson bill of complaint refers to these orders (R. 43).

On September 28, 1932, Judge Manton made an order continuing the receiverships during the pendency of the Brake Shoe suit (R. 223).

Since the commencement of the Brake Shoe suit many administrative orders have been made from time to time by Judge Manton (R. 191, 189, 193, 201, 221, 214, 226).

The suit of Benjamin F. Johnson *v.* Manhattan Railway Company, the first above entitled cause, which is referred to hereinafter as the Johnson suit, was begun on September 20, 1932. Johnson's bill of complaint, brought by him as a stockholder of Manhattan, asserts lack of jurisdiction in Judge Manton because of non-compliance with "Rules" 1-a and 11-a.

Thereafter petitioner Lillian Boehm intervened in the Johnson suit as a party plaintiff (R. 137) and filed a "supplemental" bill of complaint (R. 80) in the nature of a creditor's bill to which were added allegations similar to those contained in bill of complaint of petitioner Johnson.

*Both petitioner Boehm and petitioner Johnson in their respective bills of complaint in the Johnson suit alleged that the appointment of receivers for Interborough was imperative* (R. 286, 24). Their allegations of fact were similar to those in the Brake Shoe bill. Their claim was that the receivers should be appointed by some other Judge than Judge Manton (R. 1024). **The whole controversy which they are pressing involves in practical effect only this point** (R. 1028). As said below (R. 1028):

"The dispute touches merely who shall be the receivers, and who the judge to have charge of the receivership."

Judge Woolsey, after hearing on October 4, 1932, and October 6, 1932, arguments on motions brought on in the Johnson suit by three orders to show cause (R. 114, 123 and 130) and rendering an opinion thereon on October 13, 1932 (R. 694), made on October 18, 1932, the so-called Consolidation Order (R. 722) and the so-called Vacating Order (R. 725). He further directed that upon certain contingencies application might be made for the appointment of receivers (R. 698).

In the Vacating Order Judge Woolsey vacated all orders in the Brake Shoe suit signed by Judge Manton on or after August 26, 1932, as *coram non judice* (R. 720); but he specifically refused for want of jurisdiction to vacate the Designation Order and the Division of Business Order signed by Judge Manton on August 25, 1932 (R. 728-729).

Judge Woolsey's orders have been reversed by the Circuit Court of Appeals.

## Summary of Argument.

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I. The Designation Order made by the Senior Circuit Judge was a valid exercise of power. Judge Woolsey, as his own order expressly recognized, had no jurisdiction to vacate it or to review or reverse its finding and declaration that the public interest required its making. No appeal was taken by either Johnson or Boehm from Judge Woolsey's denial of their motion to vacate this order.

Sections 22 and 23 are a full and complete grant of power both to the designating and to

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the designated judge; and it is not necessary to look elsewhere for their authority..... 8

II. "Rules" 1-a and 11-a cannot veto, or subordinate to the judgment of other judges, the exclusive and complete statutory powers conferred by Sections 22 and 23 both upon the designating judge and the designated judge..... 24

III. Moreover, "Rules" 1-a and 11-a are invalid for all purposes..... 29

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VI. Judge Woolsey's lack of power to make any order in the Johnson suit vacating Judge Manton's orders in the Brake Shoe suit was not affected by the Consolidation Order, since even if the Consolidation Order were proper

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it could not result in merging the two suits into one cause. The independent and separate existence of the two suits could not be affected by consolidation.

Moreover, Judge Woolsey could not do by indirection what he could not do by direction. Since he had no power in the Johnson suit to vacate orders in the Brake Shoe suit, he could not clothe himself with such power by forcibly reaching over into Judge Manton's court and possessing himself of the Brake Shoe suit by the alleged process of consolidation..... 59

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# ARGUMENT

## POINT I.

**The Designation Order made by the Senior Circuit Judge was a valid exercise of power.**

**Judge Woolsey, as his own order expressly recognizes, had no jurisdiction to vacate it or to review or reverse its finding and declaration that the public interest required its making; and no appeal was taken by either Johnson or Boehm from Judge Woolsey's denial of their motion to vacate this order.**

**Sections 22 and 23 of Title 28 of the United States Code expressly clothed Judge Manton with full jurisdiction to make the Designation Order, and to sit as a Judge in the Brake Shoe suit. That jurisdiction could not in any way be limited or restricted by any District Judge or Judges, or invalidated by any order in the Johnson suit.**

**Sections 22 and 23 are a full and complete grant of power both to the designating and to the designated Judge; and it is not necessary to look elsewhere for their authority.**

### A.

### *Sections 22 and 23.

Section 22 of Title 28 of the United States Code (Judicial Code, Section 18) so far as material, reads as follows:

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* When reference is made in this brief to Section 22, Section 23, Section 27, Section 730 or Section 731, the reference is to Title 28 of the United States Code unless otherwise specified.

> "The Chief Justice of the United States, or the circuit justice of any judicial circuit, or the senior circuit judge thereof, may, *if the public interest requires,* designate and assign any circuit judge of a judicial circuit to hold a district court within such circuit . . .
>
> "During the period of service of any judge designated and assigned under this chapter, he shall have all the powers, and rights, and perform all the duties, of a judge of the district, or a justice of the court, to which he has been assigned (excepting the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds)." (Italics ours.)

Section 23 of Title 28 of the United States Code (Judicial Code, Section 19) reads as follows:

> "It shall be the duty of the district or circuit judge who is designated and appointed under either of sections 17 to 22 of this title, to discharge all the *judicial duties for which he is so appointed,* during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, *in pursuance of said provisions,* shall have the same effect and validity as if done by or before the district judge of the said district." (Italics ours.)

These sections were enacted at the time when the Circuit Courts were abolished. Their purpose plainly was to enable the Circuit Judges to continue to exercise as theretofore original jurisdiction, if the Chief Justice, the Circuit Justice or the Senior Circuit Judge considered it in the public interest.

*District* Judges of other districts can be designated only for specific reasons, such as accumulation of business or

disability or bias of a District Judge. See Sections 17, 19, 21. But *Circuit* Judges can be designated "if the public interest requires." See Sections 22 and 23.

**B.**

**The Designation Order and Judge Woolsey's acknowledgment of lack of jurisdiction to vacate it.**

(1) The Designation Order of August 25, 1932, contains a specific finding that "the public interest" required its making (R. 177).

That finding was beyond review and must be deemed valid. The power to make the determination as to "public interest" is committed to the Chief Justice, the Justice of the Circuit, and the Senior Circuit Judge *alone*.

The determination once made by the statutory repository of the power is an administrative act which cannot be challenged, inquired into, reviewed, or reversed elsewhere, —*a fortiori* not collaterally by a District Judge (R. 1032). Judge Woolsey himself seems to have conceded as much (R. 971-3).

The statute does not require a recital of the reasons for the finding; and none is requisite or demandable. Although Section 22 (unlike Section 21) does not contain the words "in his judgment," they are implied, since the determination of the public interest involves an act of judgment by the sole repository of this statutory power. As said by Judge Hand below (R. 1032):

> "It cannot be that the act of the Chief Justice, for example, or of a Circuit Justice, is to be subjected to a scrutiny when designating a Circuit Judge, to which it is not open in the case of a District Judge."

That the simple finding of a public interest in a designation order is sufficient is amply borne out in *Craig* v. *Hecht,* 263 U. S. 255, in which there was before the Supreme Court a designation order in which the only statement with respect to public interest was "In order to meet the requirements of the public interest." The sufficiency of that designation order was not questioned by this Court.

(2) Judge Woolsey in his "Vacating Order" (whatever may be the implications of his opinion) has recognized these incontrovertible principles, for his order provides at the end (R. 728):

> "Ordered, adjudged and decreed that, in so far as said motions seek to have vacated the orders made and signed on August 25, 1932 by Honorable Martin T. Manton in his capacity as Senior Circuit Judge, they are denied for want of jurisdiction."

*From this provision of Judge Woolsey's order no appeal has ever been taken by the complainant or intervenor in the Johnson suit.* Hence, the denial of their motions "for want of jurisdiction" stands as binding on all parties not only as regards the whole of each of Judge Manton's orders of August 25th, but also as regards each and every part thereof, for the motions to vacate by the complainant and intervenor in the Johnson suit had run not only to the whole but to each part of these orders and asked for such other and further relief as might be proper (R. 115, 116, 131 and 132).

(3) Moreover, this Court will observe that Judge Woolsey, in phrasing his denial in this respect of the complainant's and intervenor's motions, declared not only his own "want of jurisdiction" but also that the orders of

August 25th were made by Judge Manton "in his capacity as senior circuit judge."

But Judge Manton could act in that "capacity" only under and by authority of Sections 22 and 23; and Judge Woolsey could lack "jurisdiction" to vacate his action only because Judge Manton had acted under and by authority of that statutory commission. If Judge Manton, in making the Designation Order of August 25th, did not have back of him the authority of those sections, then his said order would have rested on nothing; and, in that event, Judge Woolsey, according to the logic of his own opinion, would have had as to it the same power to vacate as he claims to have had in the case of Judge Manton's later orders.

(4) *At the threshold, therefore, lies this grave question:* Since Judge Woolsey's own order recognizes that Judge Manton's Designation Order was made "in his capacity as Senior Circuit Judge" under Sections 22 and 23, and that, therefore, he (Judge Woolsey) had "want of jurisdiction" to vacate it in whole or in part, how did Judge Woolsey acquire jurisdiction to vacate Judge Manton's subsequent "discharge" under authority of Section 23 of "all the judicial duties for which he is so appointed" by the Designation Order under authority of Section 22?

Surely, Judge Manton's power to make that order implies the power to carry it into effect and, therefore, includes the power to make the subsequent orders which, in a collateral proceeding, Judge Woolsey has attempted to vacate.

Chaos would result if the Circuit Judge sitting under designation of the Senior Circuit Judge could be declared "a mere usurper" by a District Judge at the instance of a

litigant who denied the existence of the "public interest" found and declared by the Senior Circuit Judge.

In other words, Sections 22 and 23 are *complete in themselves.* They grant full and complete power both to the designating judge and to the designated judge, and it is not necessary to look elsewhere for their authority or to attempt to piece it out by reference to other statutes. The authority conferred by those sections cannot be added to or subtracted from by mere rules of court.

(5) If, however, grounds for a finding of "public interest" are sought, they are described in the brief of counsel for the petitioner Boehm. That brief speaks of the "great economic, social and even political significance of the Interborough receivership" (p. 15); acknowledges it to be "a receivership involving *so great a public interest*" (p. 33); and asserts "the economic importance and political sensitivity of the receivership" (p. 36).

Counsel's reference in the petitioners' brief to some opinion by Judge Manton several months after August 25th, 1932, is wholly irrelevant. That opinion is not part of the record; and the validity of the Designation Order cannot be affected one way or the other by observations made months later, however cogent they may be as demonstrative of a public interest.

**C.**

**Under Sections 22 and 23 designation may be made for the "discharge of all the judicial duties" in a particular suit.**

(1) Section 22 is not limited in any way to a public interest, arising from congestion of calendar, or shortage of judges, or illness, absence, or disqualification of judges, or

the nature or quantity of specific business which may be before the Court. The statute requires as a condition for the exercise of the power therein conferred nothing at all except the presence in the opinion of the Senior Circuit Judge of a "public interest."

Quite obviously, and as a result of necessary logic, such public interest may, in the opinion of the Senior Circuit Judge, arise from and attach itself to some specific subject matter, some specific business, or some specific case which is, or is about to be, before the Court. In that event it is not only within the power, but it is the duty, of the Senior Circuit Judge to make a designation with respect to such specific subject-matter, business, or case. By like token, it is not only within the power, but it is the duty, of the judge so designated to "discharge all the judicial duties for which he is so appointed" (Section 23).

Since Congress has expressly imposed these powers and duties upon the judge authorized to designate and upon the judge designated, no authority rests in the District Judges to veto, limit, restrict or question their exercise by the judge designating or the judge designated.

(2) Our view is reinforced by the fact that Section 23 specifically makes it the duty of a judge so designated "to discharge all the judicial duties *for which he is so appointed, during the time for which he is so appointed.*" (Italics ours.)

This expressly contemplates that a judge may be designated to discharge *specific* judicial duties. In that case the definition of such duties must necessarily be contained in the order of designation and appointment, and cannot be added to or subtracted from by some outside source or some other power or judge.

Under this section, the powers and the accompanying duties imposed upon the designated judge are not permissive, but *mandatory*. He must discharge all that the order of his appointment requires of him. (*Ex parte United States,* 226 U. S. 420, 423.)

(3) Section 22 of Title 28 of the United States Code (Judicial Code, Section 18), as authority for a designation to try a *specific* case, was considered by the Circuit Court of Appeals for the Fourth Circuit in *U. S. ex rel. Fehsenfeld* v. *Gill,* 292 Fed. 136 (C. C. A. 4th, 1923). There a District Judge was disqualified to hear a particular suit for the reason that he had been of counsel. Thereupon, as stated in the opinion, Senior Circuit Judge Hon. Martin A. Knapp, "by order designated Hon. Edmund Waddill, Jr., Circuit Judge, *to try the case.*" (Italics ours.) Judgment went against the plaintiffs; and they appealed, denying the validity of the designation of a Circuit Judge and the jurisdiction of the Court.

Plaintiff in error argued that the consequences of the disqualification of the District Judge were governed exclusively by Section 20 of the Judicial Code (Section 24 of Title 28 of the United States Code), providing for the designation of a District Judge under such circumstances and that, therefore, the designation of a Circuit Judge was without authority of law.

In affirming the judgment below the Court stated:

> "* * * The 'public interest' is involved in all the conditions mentioned in sections 13, 14, and 20. Therefore we construe section 18 of the Judicial Code to authorize the Chief Justice, or circuit justice, or the senior circuit judge, to designate a circuit judge

> to hold the district court when any of the conditions mentioned in sections 13, 14, and 20 or any other conditions, arise which in his judgment so involve the public interest as to require the designation of another judge to hold any District Court."

A perfect precedent is also to be found in the unanimous decision of the New York Court of Appeals in *People ex rel. S. L. & T. Co.* v. *Supreme Court*, 220 N. Y. 487. In that case, the Governor of New York had issued a proclamation for an extraordinary term of the Supreme Court, under color of the authority of Section 153 of the Judiciary Law of that State. That statute authorized him to appoint such extraordinary term whenever "*in his opinion the public interest so requires.*" The proclamation of the Governor merely recited that the appointment of such extraordinary term appeared to his satisfaction to be required in the public interest (p. 490). Furthermore, the proclamation was not one for an extraordinary term for all purposes but was *expressly limited to* "the purpose of hearing and determining motions for new trials" in *specific actions of ejectment* brought by relator (which actions were identified by their titles), "and in the event new trials were granted, then to try said actions."

The relator insisted that an extraordinary term for such *specific* purpose and *specific* case was not within the purview of the enabling statute; and it proposed to show that no public interest required it. In refusing to enter upon such an inquiry and in holding that the Governor in his uncontrolled judgment might declare the public interest to rise from or in *a specific suit*, the Court of Appeals said, per Cardozo, J. (p. 491):

"The relator insists that an extraordinary term is needless. That is a question for the governor, and no one else. We cannot review the exercise of his discretion (*People* v. *Shea, supra; State* v. *Register,* 133 N. C. 746; *State* v. *Lewis,* 107 N. C. 967; *Matter of Guden,* 171 N. Y. 529). There may be reasons for urgency which we cannot know. The governor is not required to disclose them. He may have thought that the public interest demands the expeditious determination of actions affecting the title of the state. *But the whole subject is beyond our province. The power and the responsibility are his, and his only.*" (Italics ours.)

(4) No limitation is prescribed upon the general power given to the Senior Circuit Judge to designate in accordance with the public interest as he conceives it. The general power to designate for all purposes must logically, and in the absence of any limitation contained in the statute, include the lesser power to designate for a specific purpose or subject matter if such specific purpose or subject matter is the origin or the cause of the public interest which the Senior Circuit Judge finds to exist.

In other words, the power is *co-terminous* with the public interest as the Senior Circuit Judge finds it; and the general power necessarily implies and carries with it all subsidiary and incidental powers necessary or proper to effectuate and promote such public interest.

Under sections 22 and 23 the ordinary presumption of the valid exercise of an express power becomes in this case conclusive.

## D.

**Judge Lacombe's action in the Metropolitan Receivership case.**

It appears from the decision in *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 221 Fed. 440, that in 1911 when the new Judicial Code went into effect and the old circuit courts ceased to exist, there were several causes in the Southern District of New York and one or more in Connecticut which had been theretofore conducted each before a single circuit judge and which had not yet been completed. Among them was the *Pennsylvania Steel Co.* case, *supra.*

In each of these cases an order was made by the Senior Circuit Judge designating the particular Circuit Judge who had it in charge to finish the case. In the *Pennsylvania Steel* case, Judge Lacombe, Senior Circuit Judge, had been acting and a self-designation order was accordingly entered by him designating himself "to hold the district court in all matters pertaining to the above cause." *It is clear that in each of these instances he deemed that the public interest lay in the particular case itself and in nothing else, and that Sections 22 and 23 authorized him to designate even himself in a particular case.*

Could it be seriously contended that to head off Judge Lacombe's designation of himself to hold the District Court in all matters pertaining to the *Pennsylvania Steel* case, the District Judges could have adopted a so-called rule similar in effect to "Rule" 1-a (R. 702); and that, in the event of the failure or refusal of the Senior District Judge to permit Judge Lacombe as such a designated judge to take jurisdiction over that case, a litigant in another suit or even in the case itself could have successfully attacked

collaterally before a district judge any orders by Judge Lacombe on the ground that there was a total lack of jurisdiction in him?

While the fact that motivated Judge Lacombe in concluding that the public interest required the appointment of himself to handle that particular case was the fact that he had theretofore been engaged therein, such existing fact cannot be considered as exclusive of all reasons or other states of fact which could properly motivate a Senior Circuit Judge in reaching a like conclusion as to another specific case. Such reasons could be multiplied without number, but so to do is both unnecessary and irrelevant.

## E.

### The universal practical construction of Sections 22 and 23.

This practical construction by the judiciary itself is set forth in detail and beyond the possibility of contradiction in the affidavit of Mr. Nichols (R. 553-572, 655-662), wherein there are detailed many instances from the second circuit and from other circuits where Senior Circuit Judges have not only designated themselves to hold a District Court, but have specified a specific case or subject-matter with which they are to deal in holding the Court.

See, for example, orders by Senior Circuit Judge Lacombe, dated January 17, 1913 (R. 655-658), and the order of Senior Circuit Judge Waddill attached *in extenso* to Mr. Nichols' affidavit (R. 662); and see the other instances set forth in Mr. Nichols' affidavit (R. 553-556).

With knowledge of this universal practice, Congress has left it unchanged for twenty years.

As illustrative of the cogent and indeed conclusive effect of a long continued practical construction and interpretation of a statute by administrative officers or judicial officers, see

*United States* v. *Hermanos y Compania,* 209 U. S. 337, 339;
*Robertson* v. *Downing,* 127 U. S. 607, 613;
*United States* v. *Falk,* 204 U. S. 143, 152.

Our investigation of the practice in the second circuit and in the other circuits where, and at the times when, these orders were made by the Senior Circuit Judges shows (and this Court because of its familiarity with judicial history may take judicial notice), that at all such times there was among the Judges of the District Court an agreement or a practice whereby district judges held different parts of court and divided the court's business between them,—one of these parts being a part assigned by the practice of the Court to deal with the class of cases which would include the specific case to which the Senior Circuit Judge had assigned himself or one of his associates.

For example, when, on January 17, 1913, Senior Circuit Judge Lacombe assigned himself to hold a District Court to determine all matters in the case of *Parsons Non-Skid Co., Ltd.* v. *Holmes, etc.* (R. 655-658), there was a part or term of the District Court presided over by a district judge to which cases of the class to which the *Parsons* case belonged were assigned by the then practice of the Court and by the then division of business by the district judges between themselves.

Nevertheless, during all that period of time no one even dreamed that such established practice and such agreement

for the division of business could restrict or limit in any way the exercise of the statutory power of the Senior Circuit Judge to designate himself or one of his associates to hear or conduct a *specific* case,—a power not only supported by the statute but by the long established practical construction and interpretation above referred to.

If that existing practice could not limit—and no one claims that it did or could limit—the aforesaid exercise of power by the Senior Circuit Judge under Sections 22 and 23, certainly these two "Rules" 1-a and 11-a cannot create or supply such a limitation.

## F.

**Discussions in Congress show that Section 22 of the United States Code (Section 18, Judicial Code) was considered and intended to be sufficient, where the public interest required, to authorize the designation of a Circuit Judge to conduct a particular case in the District Court.**

In December, 1910, the discussion in the House involved the scope and legislative intent of Section 18 of the Judicial Code (now Section 22 of Title 28 of the United States Code). The following excerpts show that the chief purpose of Congress in enacting this section was to enable the Chief Justice of the United States or the Circuit Justice of any Judicial Circuit or the Senior Circuit Judge thereof to recognize that *in some specific important case* "the public interest" might require the designation of a Circuit Judge to hold a District Court.

These excerpts are taken from Vol. 46 of the Congressional Record, Part I.

At page 302:

"MR. BARTLETT of Georgia. * * * But you have, as I understand it, in this amendment to the law, in section 18, which is new, made a provision by which a circuit judge can be required to go and preside *in important cases whenever, in the judgment of the senior circuit judge, it is found necessary* to assign a circuit judge to the district court." (Italics ours.)

"MR. MOON of Pennsylvania (Chairman of the Committee). That is true; in order that this bill shall not require the creation of any additional judges and that the present judicial force of the country shall administer the business *just as it does now.*" (Italics ours.)

"MR. BARTLETT of Georgia. So that the cases will be more frequently tried in the district court by circuit judges than in many instances they are tried now?"

"MR. MOON of Pennsylvania. Fully as frequently, anyhow."

Again, at page 302:

"MR. PARKER: But the bill goes much further than that. From the beginning the courts of the United States have been on the English plan, where, *if it be an important case,* the judge of the highest court went down in order to try the case before the people in the beginning. Under these circumstances, the Supreme Court, with one of their justices assigned to the circuit, can always go to a circuit or a district court *and try a case.* The circuit judges of the circuit can also go to any district *and try a case.*"

At page 303:

"MR. MOON (Chairman of the Committee): *I will say that I think it is entirely covered by section 18.*

> My friend may think differently, and when we come to the eighteenth section let us perfect it. This is the section with reference to the designation of circuit court judges *to try cases* in the district courts. *I think it is entirely covered by that section.*" (Italics ours.)

When the bill was before the Senate on February 8th, 1911, and the repealing provisions of Section 18 Judicial Code were reached in the Senate, there was general discussion following a motion by Senator Root, of New York, to strike out Section 274 consolidating the Circuit and District Courts, 46 Congressional Record, page 2136. In the course of this discussion Senator Sutherland said, at page 2138:

> "The flexibility, however, of the whole system which permits *an interchange of judges* is not in any manner affected by this change of the law * * *."

Senator Clark, of Arkansas, a member of the Committee, said, at page 2138:

> "It will assign to their appellate functions the judges of the Circuit Court and it will reserve their right to appear upon the district bench, just as it reserves in favor of the judges of the Supreme Court of the United States *whenever an occasion of sufficient importance seems to make it necessary,* the right to sit in the Circuit Court." (Italics ours.)

The bill was passed following the discussion on that day. 46 Cong. Rec., Vol. III, page 2140.

## POINT II.

**"Rules" 1-a and 11-a cannot veto, or subordinate to the judgment of other judges, the exclusive and complete statutory powers conferred by Sections 22 and 23 both upon the designating judge and the designated judge.**

"No rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law."

*Washington-Southern Co.* v. *Baltimore Co.*, 263 U. S. 629, 635.

(1) We submit that Judge Woolsey's decision amounted to a declaration that the district judges can strip the Senior Circuit Judge of the effective use of the statutory powers expressly conferred exclusively upon him by sections 22 and 23, and can nullify the powers and duties expressly imposed upon the designated circuit judge by the same sections. Indeed, Rule 11-a is frankly aimed at "*designated*" judges only. It does not apply to regularly appointed district judges.

Judge Woolsey says that the district judges have this right by virtue of the rule-making power conferred by section 731 of Title 28 of the United States Code. But that very section declares that their rule-making power shall not be exercised "in any manner" "*inconsistent with any law of the United States.*"

Are not "Rules" 1-a and 11-a, interpreted and applied as they have been by Judge Woolsey, clearly inconsistent to that extent with sections 22 and 23?

A few tests will conclusively demonstrate the inconsistency.

How can Judge Manton, as Senior Circuit Judge, effectuate his finding of the requirements of the public interest if, under Rule 1-a, the Senior District Judge refuses to assign the designated circuit judge to any work, or assigns him only to work having no relation to the public interest in furtherance of which he was appointed under sections 22 and 23?

Or how can Judge Manton, as Senior Circuit Judge, effectually designate a circuit judge "to discharge all the judicial duties for which he is so appointed" (section 23), and clothe him, for the purpose of their discharge, with "all the powers and rights" "of a judge of the district" (section 22), if under Rule 1-a the Senior District Judge can prevent his discharge of all judicial duties or at least of "the judicial duties for which he is so appointed," and can prevent his exercise of the intended "powers and rights" by assigning him to no work or to wholly unrelated work?

Or how, for example, could Judge Lacombe as Senior Circuit Judge have effectively designated himself to hear all applications in equity in the *Pennsylvania Steel Co.* case, if the district judges by a rule like Rule 11-a could have directed that all such applications must be heard by some other judge or in some other courtroom?

Or how can the judicial duties which the designated circuit judge is to discharge spring from the terms of his appointment by the Senior Circuit Judge as provided in section 23, if judicial duties in the district court are to be exercised only upon designation of the Senior District Judge, or if the district judges by agreement among themselves can assign to a district judge the very judicial duties to which the circuit judge was appointed?

The famous declaration of Chief Justice Marshall that "the power to tax is the power to destroy," may be pertinently paraphrased here. The power of the Senior District Judge under Rule 1-a to say what work shall be done is the power to say that no work shall be done.

(2) Judge Woolsey declares that the district judges "must, within the law, be masters in their own house" (R. 700-701); that Judge Manton's action was that of an intruder, and that his procedure in the district court was wholly irregular (R. 720).

These very statements illustrate, we submit, the extent to which his decision nullifies the powers, rights and duties of the designating and designated judges under sections 22 and 23; and, therefore, they emphasize the illegal effect which he has given to Rules 1-a and 11-a. They squarely abrogate the exclusive or supervisory power in the public interest which sections 22 and 23 give to the Senior Circuit Judge; and they abrogate the power of the designated circuit judge "to discharge all the judicial duties to which he is so appointed" under section 23 by the Senior Circuit Judge in the furtherance of the requirements of the public interest as found by the latter. If these express statutory powers of the Senior Circuit Judge and of the designated circuit judge are to be, or should be, abrogated, the abrogation must be by act of Congress and not by the rule-making power of district judges.

(3) At another point Judge Woolsey says, in effect, that the designated circuit judge does not acquire "such a status in the District Court as to give him a right to participate in the division of business of the District Court, or in its rule-making" (R. 708).

And elsewhere Judge Woolsey says (R. 717):

> "The whole matter may be summed up by saying that when a Circuit Judge is designated to hold a District Court and proceeds to sit therein, he is acting as a District Judge and must obey its rules."

But suppose its rules are in effect designed—as Rules 1-a and 11-a obviously are—to keep circuit judges out of the district court except in connection with business (if any) designated by the Senior District Judge instead of by the Senior Circuit Judge, or designated by the district judges through the device of dividing the court's business among themselves! Can such rules be valid and effective, without reducing to an empty shell and a mockery Sections 22 and 23?

Compare Judge Woolsey's above-quoted declaration that the designated circuit judge has no power to participate in the division of business of the district court or in its rule-making power, with the express declaration of Section 22 that the circuit judge so designated "shall have all the powers and rights" "of a judge of the district."

Compare Judge Woolsey's above-quoted statement that the designated circuit judge has no power as to rules except to "obey" those already made, with the express declaration of Section 22 that the only power of a district judge which the designated circuit judge shall *not* have is "the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds." The very statement in the section of these three exceptions to equality of power demonstrates the all-inclusive character of the intended equality in all other respects.

Suppose there was but one district judge in the district—and there are many such districts. Is it thinkable that

such sole district judge by promulgating rules like 1-a and 11-a could cut the designated circuit judge out of all function, or out of all those which the sole district judge might choose to keep for himself? If so, what becomes of the express declaration in Section 23 that "all the acts and proceedings in the courts held by" the designated circuit judge, "in pursuance of said provisions" of Sections 22 and 23, "shall have the same effect and validity as if done by or before the district judge of said district"?

(4) Judge Woolsey refers repeatedly to "orderly judicial procedure." But, the only "orderly judicial procedure" is the procedure prescribed by law; and no district judge has the authority to denounce or nullify the procedure prescribed by Sections 22 and 23 on the ground that it prevents the district judges from being the sole "masters" in the "house" of the district court or otherwise. The district judges have no power to expel from the doors of this "house," or to admit only on sufferance, those other judges from a higher court upon whom Congress has conferred an equal right of habitation when "the public interest requires."

Judge Woolsey says that the designated Circuit Judge "does not carry with him down to the District Court any appellate attributes which put him *above* the other District Judges" (R. 717) (italics ours). No one claims that he does. What we do claim is that Judge Woolsey's decision puts the designated circuit judge *below* and under and at the mercy of the district judges; and that, in addition, it nullifies the functions of such designated circuit judge and of the Senior Circuit Judge as prescribed in Sections 22 and 23.

Sections 22 and 23 are a full and *complete* grant of power both to the designating and to the designated judge. Judicial authority can be exercised thereunder irrespective of any other grant of power. Hence so-called rules of the District Court can no more subtract from that authority than they could add to it.

## POINT III.

**Moreover, "Rules" 1-a and 11-a are invalid for all purposes.**

Section 731 of Title 28 of the United States Code provides as follows:

> "RULES OF PRACTICE IN DISTRICT COURTS. The district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under section 730 of this title, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings" (R. S., §918).

Section 730 of Title 28 of the United States Code, referred to in the foregoing Section 731, provides as follows:

> "REGULATION OF PRACTICE OF DISTRICT COURTS BY SUPREME COURT. The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the

> modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the district courts" (R. S., §917).

Under Section 730 the Supreme Court promulgated the rules of practice in equity cases for all Federal courts on November 4, 1912. These are known as the Equity Rules of the United States Supreme Court. Equity Rule 79 provides as follows:

> "RULE 79. ADDITIONAL RULES BY DISTRICT COURT. —*With the concurrence of a majority of the Circuit Judges* for the circuit, the District Courts may make any other and further rules and regulations *for the practice,* proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same" (Italics ours).

Rules 1-a and 11-a were each promulgated by the District Court as "a General Rule of this court."

*That they never had received the concurrence of a majority of the Circuit Judges for the circuit is conceded and asserted by Judge Woolsey, one of the authors of these "Rules"* (R. 714).

## A.

**"Rules" 1-a and 11-a, if rules at all, are rules governing practice, proceedings and/or process in equity, and are invalid since they have not been concurred in by a majority of the Circuit Judges in conformity with Supreme Court Equity Rule 79.**

(1) What is a rule in equity? Section 730 supplies the answer. That section, after referring to forms of writs and other process, to the "modes" of framing and filing proceedings and pleadings, of the taking and obtaining of evidence, of the obtaining of discovery, of "*proceedings to obtain relief,*" and of the making of decrees, includes, within its scope, the general power to make rules and

> "* * * to *regulate the whole practice* to be used in suits in equity * * *" (Italics ours).

These words "the modes of proceeding to obtain relief" in equity, and the further words "to regulate the whole practice" in equity, not only include specifically *applications for* the appointment of receivers as one of "the modes of obtaining relief" in equity, but also include whatever of "the whole practice" in equity is not specifically covered by the specific matters mentioned in the section. They are completely comprehensive of any matter of practice concerning or affecting the administration or conduct or hearing of suits in equity.

Hence they are of necessity a statutory definition of a rule in equity; and by the statute the power to make rules in equity, so defined and with such content, is exclusively conferred upon the Supreme Court of the United States.

This interpretation is further confirmed by the sub-title of that section, which reads:

> "Regulation of *Practice* of District Courts by Supreme Court" (Italics ours).

Thus both by the content of the section and by its sub-title any rule concerning or affecting "the mode of proceeding to obtain relief" in equity (as, for example, applying for receivers) or concerning or affecting any other matter of "practice" in connection with an equity case, is an equity rule within the meaning of the statute.

This definition, of course, controls the meaning of the term "Equity Rules" as used by the Supreme Court in its formulation of rules under that name. The official title of this formulation is "Equity Rules of *Practice,*" and the comprehensive character of that term and of the content of the rules embraced in the Supreme Court's formulation of Equity Rules is shown by final Equity Rule 81, which declares:

> "These Rules shall be in force on and after February 1, 1913 and shall govern *all proceedings* in cases then pending or thereafter brought" (Italics ours).

Of necessity this language of the Supreme Court demonstrates that it meant that any proceeding in any cause in equity was governed by the practice of the Federal Courts in equity and hence by the content, restrictions and meaning of the "Equity Rules."

(2) It is quite true that the Equity Rules do not specifically set forth a practice for each proceeding in an equity cause. They themselves expressly recognize a residuum

of subject matter not covered by the specific rules; and as to that residuum they provide in Rule 79 that, *with the concurrence of a majority of the Circuit Judges,* the district courts

> "may make any other further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed."

Not only could language not be more comprehensive but language could not more definitely convey the conception of the Supreme Court that *any rule or any regulation* of a district court which affected the practice or the proceedings or process, mesne or final, in an equity cause, rested for its authority and validity on Section 730 (governing the practice in equity causes) and on the power thereby delegated by Congress to the Supreme Court and by the Supreme Court through Equity Rule 79 to the District Courts subject to "concurrence of a majority of the Circuit Judges."

Mesne or interlocutory proceedings and process have been defined in *Horn* v. *Pere Marquette R. Co.,* 151 Fed. 626. The court said at page 636 concerning practice in equity:

> "When there is no settled *practice* to guide a judge, the limitations upon his powers at chambers must be found in the distinction between those steps, in an equity cause, which tend to prepare the cause for hearing or preserve the subject-matter until such a hearing, and those judgments which adjudicate the ultimate merits. That which does not adjudicate the merits is interlocutory. Mr. Daniel defines an 'interlocutory application' as 'a request to the court or to a judge at chambers, for its interference in a matter arising in the progress of a cause or pro-

> ceeding; and it may either relate to the process of the court, or to the protection of the property in litigation *pendente lite,* or to any matter upon which the interference of the court or judge is required before, or in consequence of a decree or order'."

The same decision squarely holds that an application for the appointment of a receiver is an interlocutory proceeding in equity (p. 637).

> "If Mr. Daniel's definition of an interlocutory order is correct, and we see no reason for doubting it, *an application for a receiver pendente lite* is plainly within any reasonable interpretation of the third *rule in equity.*" (Italics ours.)

(3) "Rule" 1-a in so far as it purports to limit the exercise of equity jurisdiction by a *designated* judge, and "Rule" 11-a in so far as it purports to tell one seeking the appointment of equity receivers, where and before whom to apply, clearly affect not only the "practice," but also "proceedings," in an equity cause and also affect mesne "process" in an equity cause, and hence fall squarely within the very terms of Equity Rules 79 and 81 and therefore within the requirement that there should be *concurrence by a majority of the Circuit Judges.*

"Rule" 11-a possesses all these characteristics *eo nomine.* It is expressly directed to "all applications for the appointment of receivers *in equity causes*" (italics ours), and requires that such applications shall be made to the judge assigned to hold the motion part of the business of the court and to no other judge. If this is not a "regulation of practice" in an equity cause, such a phrase can have no meaning. The appointment of receivers (except in bankruptcy) is an exclusive function of an equity court.

Indeed, it is one of its outstanding functions. Furthermore, the application for the appointment of a receiver in an equity cause is of necessity and *eo nomine,* a "proceeding" in an equity cause. Still again, inasmuch as such an application is granted (if granted at all) by an order which in connection with the appointment of temporary receivers requires the parties in interest to show cause at a given time why the receivership should not continue, the application is of necessity and *eo nomine* an application for "mesne process" in an equity cause. In other words, *the application dealt with in "Rule" 11-a falls within all three categories mentioned in Equity Rule 79,* and must therefore of necessity be governed by the requirement that, whether regarded as a "rule" or regarded as a "regulation," it can have no validity *without the concurrence of a majority of the Circuit Judges.*

Furthermore, "Rule" 11-a purports to govern a "mode of proceeding to obtain relief" in equity (*to wit,* the mode of proceeding to obtain the relief of the appointment of a receiver in equity), and therefore by the very terms of Section 730 again purports to be a rule in equity.

This is equally true with respect to "Rule" 1-a in so far as it purports to limit the exercise of equity jurisdiction by a *designated* judge. That "Rule" necessarily governs and controls the most supreme of all matters of practice in an equity cause,—the method and manner of determining the Chancellor to hold the equity cause. The "Rule" by its terms enables the Senior District Judge not only to prevent any judge designated to sit in the District Court from entertaining or hearing any equity cause or any application in an equity cause, but it also enables the Senior District Judge to prevent parties seeking relief in equity from applying to any such judge.

Since, by Sections 19, 20, 21 and 22 of Title 28 of the United States Code (Judicial Code, Sections 15, 16, 17 and 18), judges designated to sit in the district court "have all the powers and rights" and perform "all the judicial duties for which" they are so appointed, each judge so designated has power and jurisdiction to hold an equity court, try equity causes and hear applications in equity. Hence, any rule which purports to limit, suspend or destroy the exercise of that power on his part is of necessity a rule or regulation which purports to govern the "practice," the "proceedings" and the issue of "process" in equity suits within the meaning of Section 730 and of Equity Rules 79 and 81, *and therefore would require for validity the concurrence of a majority of the Circuit Judges.*

(4) On the one hand, Judge Woolsey in order to denature Rule 11-a as an equity rule diminishes it to a mere direction to litigants, a mere signpost pointing "to the door of the room" where particular business is to be done (R. 714). He refers to it as only "a calendar rule" (R. 876).

On the other hand, Judge Woolsey in order to denature Judge Manton as a judge and a judicial officer clothed with statutory jurisdiction magnifies Rule 11-a into substantive law exclusive of all other power and practice. He refers to it as having "the juridical status of statutes" (R. 713), and as rendering the orders of Judge Manton *coram non judice* (R. 720).

(5) There are many other considerations which reinforce this view. Section 41 of Title 28 of the United States Code prescribes that "a District Court shall have original

jurisdiction as follows: of all suits of a civil nature at common law or in equity." In consequence, when Section 22 authorizes a Senior Circuit Judge to designate any Circuit Judge "to hold a District Court," the section necessarily means that such Circuit Judge so designated is empowered to hold a court having original jurisdiction of all suits in equity as prescribed in Section 41. Hence, any rule adopted by District Judges which impairs, destroys or makes conditional the exercise by such a designated judge of the original jurisdiction in equity thus conferred upon him by express terms of the statute, is not only an unauthorized limitation of substantive law, but is certainly an attempt to regulate practice in equity, to govern proceedings in equity, and to limit the sources from which mesne process may issue in equity.

A rule which thus takes away from a designated Judge the right to exercise any power in equity (except by and with the consent of another judge and at the latter's pleasure) necessarily takes away all the *practice* in equity which would otherwise attach to such a designated judge holding a district court, for "the tail must go with the hide."

(6) The insertions of "Rules" 1-a and 11-a within the so-called "General Rules" of the Southern District, cannot change their essential nature as rules or regulations affecting practice, proceedings and process in equity.

This essential nature is made the more manifest by a glance at the subject-matter of those rules which this District Court has itself classified under the heading of "Equity Rules" *for which the concurrence of a majority of the Circuit Judges has heretofore been obtained.*

Thus, in Rule 4 of the Equity Rules of the Southern District of New York there is a provision that a judge who has appointed a receiver in equity shall thereafter hear all subsequent matters in that cause. Why can such a rule be an equity rule, and yet a rule which requires applications for the appointment of receivers to be made before the judge holding the Motion Part, not also be an equity rule? Why is one rule a regulation of equity practice and proceeding, and the other not?

So, likewise, Rule 4 of the Equity Rules of the Southern District further prescribes:

> "Petitions for the appointment of a receiver * * * and motions or petitions for orders upon merely administrative or routine matters may, in his (the judge's) discretion, be heard by him *ex parte*, and except that motions or petitions as to merely routine matters, if contested, may be heard on notice in the General Motion Part, or, if uncontested, may be heard *ex parte*, by the judge assigned to hold that part."

Surely, this regulation designated by the District Court itself as an equity rule is in no different category than "Rule" 11-a. They both relate expressly to the same subject-matter, to wit, the identity of the judge and the identity of the place where an application in equity for the appointment of a receiver shall be made.

Furthermore, Rule 4 of the Equity Rules of the Southern District provides:

> "If the Judge who appointed the receiver be disqualified in a particular matter, or if he be no longer in office or be ill, incapacitated or absent from the District, *the Senior District Judge* (or if he be ill,

incapacitated or absent from the District, the then acting Senior District Judge) shall act or *designate another Judge* to act in the cause temporarily or during its further progress, as occasion may require." (Italics ours.)

By what process of casuistry can such a rule be characterized or classified as an equity rule, and yet "Rules" 1-a and 11-a be said not to be equity rules?

(7) Judge Woolsey states in his opinion that "Rule" 11-a "simply points to the door of the room where applications for receiverships must be made" (R. 714). It is submitted that the entire purpose of Equity Rule 4 of the Southern District is *also* simply to "point to the door" where various applications may be made; and yet the district judges showed their recognition of it as a true rule in equity by submitting it to the circuit judges for concurrence.

(8) Further, Judge Woolsey states that "Practice in equity in receivership cases only commences *after* the making of the order of appointment, which, in consent cases, is analogous to the issuance of process, for then only does an equity receivership based on consent begin." (R. 714.) (Italics ours.)

We submit that in any such case both the practice and the cause begin with the filing of the bill and the securing of equity process or the voluntary appearance of the defendant, and that the appointment of the receiver is a proceeding in the cause after its commencement. Moreover, we submit that a proceeding to obtain the appointment of receivers is a "mode of proceeding to obtain relief" in equity, and, therefore, squarely within the definition and precise subject matter of an equity rule as defined by Section 730.

Any appointment of receivers in equity presupposes an existing cause, for the appointment itself is merely an *interlocutory* proceeding and order in a pending cause. Hence, the practice in such a cause in equity began when the cause began; and the application for receivers therein was part of the interlocutory practice in equity in that cause.

In *Horn* v. *Pere Marquette R. Co.*, 151 Fed. 626, the action was commenced by the filing of a bill asking for the appointment of a receiver. The defendant appeared and consented to the appointment of a receiver. At page 634 the court used the following language, which is a complete answer to Judge Woolsey's astounding statement that in equity receivership cases "practice only commences *after*" the appointment:

> "An order appointing a receiver made at chambers, like an order allowing an injunction or other interlocutory order, *presupposes a pending case.* The objection that there was no pending suit when the order in this case was made is a misconception." (Italics ours.)

**B.**

**If it be contended that "Rules" 1-a and 11-a were authorized by Section 27 of Title 28 of the United States Code, they could have no binding effect upon Judge Manton who in no way participated in their adoption.**

**Moreover, Judge Woolsey admitted that they had not been adopted under authority of that section.**

Section 27 of Title 28 of the United States Code (Judicial Code Section 23) reads as follows:

> "DISTRICT WITH MORE THAN ONE JUDGE; DIVISION OF BUSINESS. In districts having more than one dis-

> trict judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district."

(1) Judge Woolsey, in his opinion, stated that it was pursuant to the power vested in the District Court by Section 731 (not Section 27) that it claimed to have made and promulgated "Rules" 1-a and 11-a (R. 713). Since he participated in the adoption of these "Rules," he must be deemed to speak on this subject from personal knowledge.

Judge Woolsey's holding to this effect was foreshadowed by his statements as contained in the following colloquy which took place on the argument (R. 888-890).

> "Mr. Tuttle: * * * I am not quite clear whether I gathered from your Honor's remark—to take up another angle of this matter—whether I gathered from your Honor's remark this morning that you thought these so-called Rules 1-a and 11-a were passed under authority of Section 27 relative to the division of business?
>
> "The Court: *Oh, not at all.*"
>
> * * * * * *
>
> "Mr. Tuttle: Well, then, I understand your Honor's position to be that Rules 1-a and 11-a are not to be supported under that particular section.
>
> "The Court: *Under division of business, I do not think that has anything to do with rule making under the law.*
>
> "Mr. Tuttle: Then I assume your Honor's position is that the authority for them, as rules, would fall under Sections 731 and 730 of the statute deal-

ing with rules of practice in District Courts and the regulation of practice in District Courts by the Supreme Court. Otherwise——

"The Court: *Yes, absolutely.*"

(2) Moreover, it is quite obvious that "Rules" 1-a and 11-a cannot, as Judge Woolsey thus conceded, be deemed authorized by Section 27.

Section 27 confers no power to make permanent "General Rules," as these are called. That power is fully dealt with in Section 731; and that Section is clearly designed to be exclusive and to exhaust the subject. Section 27 deals solely with *agreements* between the individual judges themselves to divide business from time to time. It would cover current arrangements among the judges as to what particular judge shall sit at a particular part of the Court at a particular time. It would not cover a permanent rule that business of a particular class shall be conducted at a given part.

Only three constructions of Section 27 are possible:

1. That in districts having more than one *regularly appointed* district judge, *the regularly appointed* district judges may agree upon a division of all the business and the assignment of all the cases for trial in the district, without regard to any *designated* judge or judges acting under sections 22 and 23 of Title 28, and that these latter judges must be bound by any division agreed to by the *regularly appointed* district judges.

2. That in districts having more than one *regularly appointed* district judge, the *regularly appointed* district judges may agree upon the division of business and assignment of cases for trial as between themselves, but without any effect on the

jurisdiction, rights, powers or duties of a *designated* judge or judges acting under sections 22 and 23.

3. That in districts having more that one district judge, whether by regular appointment or such designation, those judges may agree upon the division of business and assignment of cases for trial.

We submit that the first construction is absurd. It would result in the right of the *regularly appointed* district judges to strip any designated judge, whether appointed by the Chief Justice, the Circuit Justice or the Senior Circuit Judge, of all powers, although in case of designations under Section 22 the statutes specifically provide that the designated judge "shall have all the powers, and rights, and perform all the duties, of a judge of the district, * * *" (Section 22) and be obligated "to discharge all the judicial duties for which he is so appointed * * *" (Section 23).

In *Harmon* v. *United States,* 43 Fed. 817 (1890), the court held in effect that the designated judge had the same status as the regularly appointed judge.

Certainly Section 27, which as shown above, is open to two other constructions, both more reasonable, cannot be so construed as to be inconsistent with Sections 22 and 23 and the prior sections of Title 28 of the United States Code giving powers to judges designated pursuant thereto. Certainly it is not jurisdictional. The jurisdiction of the *court* remains the same, however the *judges* may agree among themselves to divide the work of the court. The jurisdiction of the designated *circuit* judge "to discharge all the judicial duties for which he is so appointed" remains the same, however the *district* judges may agree among themselves upon a division of their respective work.

(3) Judge Woolsey states in his opinion:

> "Judge Manton's second order of August 25, 1932, which I shall call the Division of Business Order, involved an attempt to get around General Rule 11-a which requires all applications for receiverships in equity cases to be made only to the Judge assigned to hold the Bankruptcy and Motion part of the business of the Court and to no other Judge."

On the contrary, it was "Rule" 11-a itself, we respectfully submit, which was the actual and certainly the original "attempt to get around" something, to-wit, to get around and circumvent the authority of the Senior Circuit Judge under sections 22 and 23 of Title 28. Judge Manton by his second order of August 25th merely registered his protest against that attempt and his determination that it was ineffective.

Judge Manton's jurisdiction was fully established by his Designation Order. That order was in itself ample foundation for all later interlocutory orders in the cause. Evidently, out of an abundance of caution, he made the Division of Business Order so that there could be no possible inference that he in any way agreed to or recognized himself as bound by "Rules" 1-a and 11-a.

## POINT IV.

**Judge Woolsey had no power to vacate orders made by Judge Manton in the Brake Shoe suit for the further reasons (1) that Judge Manton's status in that suit was at least that of a judge *de facto* and his acts as such could not be reviewed in the Johnson suit or by a judge of coordinate jurisdiction, and (2) that the orders made by Judge Manton in the Brake Shoe suit were not open to collateral attack.**

**"Rules" 1-a and 11-a, if they can have any validity at all, are merely directory. They cannot strip any judge of the authority and power conferred by statute. They cannot render Judge Manton a mere "usurper."**

We submit that Judge Manton was, for all of the purposes of the Brake Shoe suit, a *de jure* judge; but in any event he was, for the purposes of that suit, at least a *de facto* judge.

(1) In the Brake Shoe suit the status of Judge Manton had back of it the following predicates:

(a) A statute authorizing the Senior Circuit Judge of a Circuit to designate and assign any Circuit Judge of his Circuit to hold a District Court within his Circuit, if the public interest requires, and giving to a Circuit Judge so designated "all the powers and rights" of a judge of the district and requiring him to perform all the duties of such a judge (Section 22).

(b) A judge acting as a Senior Circuit Judge in the Second Judicial Circuit and duly authorized so to act.

(c) A duly made order of such Senior Circuit Judge containing a finding that the public interest required that Judge Manton be designated and assigned as a Circuit Judge to hold a District Court within the Second Circuit and designating and assigning Judge Manton to hold a District Court for the Southern District of New York and particularly to hear and determine all applications and proceedings in the Brake Shoe suit (the Designation Order). The application of plaintiffs in the Johnson suit for the vacation of this order was denied by the Court below for want of jurisdiction, and that portion of his order was never appealed from by the present petitioners.

(d) A statute which provides that it shall be the duty of any Circuit Judge so designated "to discharge all the judicial duties for which he is so appointed" (Section 23).

(e) A suit (the Brake Shoe suit) over which, and over the subject matter of which, the District Court for the Southern District of New York had competent jurisdiction by reason of the necessary diversity of citizenship and the amount involved. Judge Woolsey in his opinion finds this to be a fact (R. 712).

(f) Parties over whom in said suit the District Court for the Southern District of New York had personal jurisdiction. Judge Woolsey found this to be the fact in his opinion (R. 712).

(g) A consent by all the parties to said suit to the jurisdiction of Judge Manton in the suit.

(h) Judicial action taken by Judge Manton in the Brake Shoe suit pursuant to the provisions of the Designation Order.

Thus all conditions required to make Judge Manton at least a *de facto* judge in the Brake Shoe suit are present,

*i. e.,* a duly constituted court, a duly instituted suit, jurisdiction in the court over the subject matter and the parties, and the exercise therein by Judge Manton, acting and purporting to act as judge of the court, of judicial powers under color of the direction and authority contained in the Designation Order.

(2) The status of a *de facto* judge cannot be attacked collaterally either in the suit in which he is acting or in any other suit. His right to hold his office can be questioned only in proceedings, regularly instituted for that purpose, to which he is a party, in the form provided by law.

The acts of a *de facto* judicial or other officer are as valid and binding in all respects as if he were a *de jure* officer. The officer may be ousted from holding his office and thus prevented from performing any future acts. But if he is a *de facto* officer, then any acts he has already performed cannot be assailed except for such irregularities or errors as would make those acts assailable had he been a *de jure* officer.

In *33 Corpus Juris* (p. 933) it is said:

> "*Judge de Facto.* A judge *de facto* is a judge *de jure* as to all parties except the state, and his official acts, before he is ousted from office, are binding on third persons and the public. *His right to hold his office can be questioned only in proceedings, regularly instituted for that purpose, to which he is a party,* in the form provided by law; it cannot be attacked in a collateral proceeding. *Nor can his title be determined in an action tried before him; nor in certiorari proceedings; nor on an appeal.* The rules apply, although the person acting as judge is incapable of holding the office, and irrespective of the

> question whether he was properly elected, or whether he is holding two incompatible offices." (Italics ours.)

Directly in point are many authorities which are controlling:

*Ball* v. *United States,* 140 U. S. 118 (1891). This was a writ of error from *a judgment sentencing defendants to be hanged.* The facts were as follows:

Judge Sabin, the regular District Judge for the Eastern District of Texas, could not hold court during the year 1889, because of illness. Judge Boarman (the District Judge for the Western District of Louisiana), purporting to act under the Circuit Judge's appointment, held the October, 1889, term of the Circuit Court at Paris, Texas. No record of his appointment appeared on the minutes of the court in the clerk's office at Paris. *The statute under which the Circuit Judge made the designation did not confer the power to designate a judge from another state in case of a vacancy.* Judge Boarman also held the April, 1890, term of the same court (Judge Sabin having died in the meanwhile), notwithstanding that he was not designated to hold any term in Texas in 1890. At this April term the defendant was convicted before Judge Boarman.

This Court held that, as to the April, 1890, term, Judge Boarman was at least a judge *de facto,* if not *de jure.* As such, his acts were not open to collateral attack even in the very litigation in which his said acts were performed. This Court said (at p. 128):*

> "We are of opinion that the irregularities alleged did not place Judge Boarman, in holding the October term, in any other position than that of a judge *de*

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* The conviction was reversed on other grounds.

> *jure,* and that as to the April term, he was judge *de facto* if not *de jure,* and his acts as such are not open to collateral attack. *Norton* v. *Shelby County,* 118 U. S. 425; *In re Manning,* 139 U. S. 504; *Clark* v. *Commonwealth,* 29 Penn. St. 129; *Fowler* v. *Beebe,* 9 Mass. 231; *Commonwealth* v. *Taber,* 123 Mass. 253; *State* v. *Carroll,* 38 Connecticut, 449; *Keith* v. *State,* 49 Arkansas, 439; *People* v. *Bangs,* 24 Illinois, 184."

*McDowell* v. *United States,* 159 U. S. 596 (1895). There Judge Seymour of the Eastern District of North Carolina was designated by the circuit judge to hold the February, 1894, term in the Western District of South Carolina, the regular judgeship in that district being vacant. He did so until, in the middle of February, the newly qualified judge for the district took over the term. The defendant who was convicted during the remainder of that term contended that the circuit judge had no power to designate Judge Seymour to hold the February term; that in consequence that term had never been lawfully instituted or lawfully kept alive by Judge Seymour; and that, since no special term had been called, the new judge could not lawfully hold the balance of the non-existent or lapsed February term. In overruling this contention, this Court (pp. 601-2) stated:

> "But whatever doubts may exist whether the order of designation by the Circuit Judge was within his power, there is another *consideration which is decisive of this case. Judge Seymour must be held to have been a judge de facto, if not a judge de jure, and his actions as such, so far as they affect third persons,* are not open to question. Ball* v. *United*

* It is here to be noted that the defendant himself was considered a "third person," that is, even an attack by a party to the action upon the power of the *de facto* judge is collateral and will not be heard.

*States,* 140 U. S. 118, 129; *Norton* v. *Shelby County,* 118 U. S. 425; *Hunter's Adm'r* v. *Ferguson's Adm'r,* 13 Kansas 462."

In *State ex rel. Buisson* v. *Lazarus,* 33 La. Ann., 1425, the constitution of Louisiana established a court with a number of judges, and provided that the judge to whom the cause was assigned should alone have the power of rendering judgment on the merits of the case except in specified contingencies. A cause not within any of the excepted contingencies was decided by a judge *to whom it had not been assigned.* It was there held that the judge exercised "if not the powers of a judge *de jure,* at least those of a judge *de facto.*"

*Luhrig Collieries Co.* v. *Interstate Coal & Dock Co.,* 287 Fed. 711 (C. C. A., 2nd, 1923), *certiorari* denied 262 U. S. 751. Receivers had been appointed for the defendant on a creditor's bill. *All the orders in the suit had been made by a circuit judge at a time when there was on file no designation of that judge to sit in the District Court for the Southern District of New York, in which the action was brought.* In dismissing an appeal from the order denying the motion to vacate these orders, the Court said, *per curiam,* at page 713:

> "The interest of appellant in this litigation began with its bid; it has no other [illegible] the suit. All the orders made without designation by the [illegible] Judge above referred to were prior to any right on the part of appellant to be heard in this cause. Therefore it has no right to complain about orders made before its rights accrued, but *in any event the orders were made by a de facto judge and cannot be assailed collaterally. Ball* v. *United States,* 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377." (Italics ours.)

(3) If an attack could not be made in the Brake Shoe suit itself, and this fact has been clearly demonstrated, it follows of necessity that it cannot be made in another case (the Johnson suit). The authorities on this subject are likewise ample.

*In re Manning,* 139 U. S. 504 (1891). This was a writ of error to review a judgment of the Supreme Court of Wisconsin denying Manning a writ of *habeas corpus* to discharge him from a sentence of the municipal court for Ashland County. On his behalf it was claimed that the sentencing judge's appointment to the municipal court by the governor was invalid and void. In affirming a denial of the writ, this Court said (p. 507):

> "It must, therefore, be taken as conclusively settled that by the law of Wisconsin, at the time of the trial and sentence of the petitioner, the court in which he was tried and sentenced was a court *de jure,* and the judge who tried and sentenced him was at least judge *de facto,* and the sentence itself was valid; and there is no ground on which this court can hold that sentence, or the imprisonment under it, to be a violation of the Constitution of the United States. *Norton* v. *Shelby County,* 118 U. S. 425; *In re Graham,* 138 U. S. 461; *In re Duncan,* 139 U. S. 449."

This Court thus decided that *habeas corpus* was a collateral attack within the meaning of the rule that a collateral attack cannot be made upon the judgment or orders of a *de facto* judge.

*Ex parte Henry Ward,* 173 U. S. 452 (1899). Ward was convicted before Judge Meek who had been appointed to fill an alleged vacancy caused by the death of Judge Rector. Ward contended that Judge Meek's appointment was void,

because under the statute Judge Rector's death terminated the office and left no vacancy, and because the Senate, which was sitting when the appointment was made, had not given its consent.

In denying Ward leave to file a petition for a writ of *habeas corpus,* Mr. Chief Justice Fuller, writing for the unanimous court, said at page 454:

> "We need not, however, consider the elaborate argument of counsel, in this behalf, since we regard the well settled rule applicable here that where a court has jurisdiction of an offence, and of the accused, and the proceedings are otherwise regular, a conviction is lawful although the judge holding the court may be only an officer *de facto;* and that the validity of the title of such judge to the office, or his right to exercise the judicial functions, cannot be determined on a writ of *habeas corpus.*"

(4) The plaintiff Boehm, intervenor in the Johnson suit, endeavors to differentiate the cases above set forth on the ground, erroneous in point of fact, that in those cases the parties had consented to the jurisdiction of the particular judge.

But the parties to the Brake Shoe suit *consented* to the jurisdiction of Judge Manton, and no single objection was made by a party to that suit. Hence, as we submit, Mr. Boehm's contention leads to the extraordinary conclusion that, as to the parties to the Brake Shoe suit who had consented to the jurisdiction, Judge Manton was sitting in the suit as a *de facto* judge, but as to the plaintiffs in the Johnson suit, he was a mere usurper.

(5) *Case* v. *United States,* 14 Fed. (2d) 510, decided by the Circuit Court of Appeals for the Eighth Circuit and

cited by Judge Woolsey in his opinion, is readily distinguishable. There the Circuit Court of Appeals upset the conviction in a *habeas corpus* proceeding on the ground that no man could be lawfully tried criminally by a court having no jurisdiction in the territory where the offense was committed. Obviously that case in no way parallels the present. If a judge sitting in the Southern District of New York undertook to try a defendant for an offense committed only in the Eastern District, his action would not merely be irregular as violative of some rule of practice or principle of procedure but would be wholly without jurisdiction at all and violative of the constitution. In other words, the *Case* case was an instance where the Court itself was without jurisdiction, and not an instance such as the present where the Court's jurisdiction was not in issue but merely the identity of the proper judge to hear the matter.

Further reasons showing the irrelevancy of the *Case* case are stated in the opinion below (R. 1031).

## POINT V.

**In addition, a disregard of a rule of Court merely regulating practice or assigning business as between judges or parts of court, does not affect the jurisdiction of the Court itself and cannot subject the orders of the Court to collateral attack,—especially where the parties to the cause have themselves waived the application of the rule.**

(1) A party to a cause may waive even his constitutional rights as to practice and procedure in the conduct of a cause. *A fortiori,* where disregard by both parties of a

rule of practice creates a mere irregularity, such irregularity does not make null and void the jurisdiction of the court.

*Abbott* v. *Brown*, 241 U. S. 606 (1916). There a defendant in a criminal action claimed that a motion for a new trial on the ground of newly discovered evidence had been invalidly granted because of violation of a District Court rule which required that such a motion had to be made within four days after the entry of the verdict. This Court held otherwise, saying (p. 609):

> "It was a mere regulation of practice and a breach of it would be, at the utmost, *a mere error of procedure, not affecting the jurisdiction.*" (Italics ours.)

In *Lively* v. *Picton*, 218 Fed. 401, the Circuit Court of Appeals said (at p. 408):

> "The objection is also made that the common pleas court violated its local rules, which are said to require notice of application for receivership, unless upon the filing of affidavit * * *
>
> "If, under the circumstances stated, the court disregarded its local rule by dispensing with affidavit, from the fact, as alleged, that the verification of the petition was only upon information and belief (as is permitted under sections 11351 and 11354 of the General Code of Ohio), *jurisdiction to appoint the receiver was not thereby lost.* The dispensing with notice or affidavit on personal knowledge was matter of judicial discretion, an abuse of which would be reviewable directly *but not collaterally.*" (Italics ours.)

See also:

*Payne* vs. *Garth*, 285 Fed. 301, 310;
*People ex rel. Childs* v. *Extraord. Trial Term*, 228 N. Y. 263.

This view is further supported by a series of cases in which it is held that a court may in the exercise of its discretion waive the application of certain rules in particular cases for the purpose of proper administration of justice.

*Holmes* vs. *Ginter Restaurant Co.*, 54 Fed. (2d) 876 (C. C. A., 1st, 1932);
*Southern Pacific Co.* v. *Hamilton*, 54 Fed. 469 (C. C. A., 9th, 1893);
*Strohbar* v. *Dwinnell*, 29 Fed. (2d) 915 (C. C. A., 5th, 1929);
*Omaha Electric Light & Power Co.* v. *City of Omaha*, 216 Fed. 848 (C. C. A., 8th, 1914);
*United States* v. *Breitling*, 20 How. 252.

(2) Moreover, where there is more than one judge in a district, and any one of them can exercise jurisdiction in a particular suit but for a rule under which that suit is assigned to another judge or part, a violation of the rule is a mere irregularity, inasmuch as the rule is merely a rule of procedure. Each judge is legally competent through inherent power to hear such suit. The violation of the rule, when waived by the parties, *does not affect the jurisdiction.*

This rule is especially applicable because by Sections 22 and 23 of Title 28 of the U. S. Code, the circuit judge designated by the Senior Circuit Judge has "all the powers

and rights'' and must ''perform all the duties'' of a judge of the district.

In *State ex rel. Hill* v. *Lichtenberg, Judge,* 4 Wash. 553, it is said:

> ''* * * The rules of said court in partitioning the business between the respective judges thereof should be upheld, as far as possible, in order to facilitate the orderly and convenient discharge of the business, and we have no doubt of the court's authority to classify and partition it as was done. However, there can be no question, notwithstanding this, but that *each judge has all the power that any other Judge of said court has to try any cause within the jurisdiction of said court, regardless of said apportionment.*'' (Italics ours.)

In *Foley* v. *Utterback,* 196 Iowa 956, the Supreme Court of Iowa said:

> ''The district court is a court of general jurisdiction, and the mere division of judicial duties by agreement of the judges does not in itself deny judicial functions to any judge of that court.''

In *White* v. *Superior Court of City and County of San Francisco,* 110 Cal. 60, it was held that:

> ''Whether sitting separately or together, the judges hold but one and the same court, and the jurisdiction they exercise in any cause is that of the court, and not the individual. The division into departments is purely imaginary, and for the conveniences of business and of designation. Transferring a cause for trial or disposition from one of those departments to another does not affect a change or transfer of the jurisdiction of that cause; that remains at all times in the court as a single entity.''

This is also true, although the division of business is by statute instead of by rule.

The case of *State ex rel. Buisson* v. *Lazarus, Judge,* 33 La. Annual 1425, is a case peculiarly striking in its pertinence. There Article 130 of the Louisiana Constitution provided that a judge of the Civil District Court to whom a cause had been assigned should thereafter have "*exclusive* control of it from its inception to its final determination," subject only to disability through sickness or otherwise. In construing this provision, the Supreme Court of Louisiana held, to quote the headnote (p. 1426):

> "But the Constitutional direction is not one of public order, and does not strike with absolute nullity such a judgment when rendered by any other of the five judges. The parties to suit themselves may consent that the judgment be so rendered. Therefore, a judgment rendered by another judge than the one to whom the cause was assigned, in case writs of absence or other disability of the latter, may be valid, if no timely opposition or objection is made thereto."

The opinion in that case might well have been written in the present case. To quote (p. 1431):

> "The objection is aimed, not at the jurisdiction of the *court* as a court, but at the irregularity of the mode, or illegality of the process, by which the cause appeared before the judge and was passed upon by him. It goes to the administrative power of regulation exercised by the judge, in disposing of the suit."

In *People* v. *Barbera,* 78 Cal. App. 277, it was said:

> "* * * The trial was had in department 11 of the superior court, state of California, in and for the

city and county of San Francisco, and it is contended that this department and the judge presiding therein are not those designated by the judges of the superior court to hear cases coming under the Juvenile Court Law, in accordance with the provisions of section 16 of said law. * * *

"If it be true that this cause should more properly have been heard in another department of the superior court, the record discloses, at most, an irregularity. Graziani *v.* Denny, 174 Cal. 176, 179, 162, p. 397; Nickel *v.* State, 179 Cal. 126, 129, 175, p. 641. Whether sitting separately or together, the judges of the superior court hold but one and the same court, and *the jurisdiction they exercise in any cause is that of the court* * * *." (Italics ours.)

(3) Judge Woolsey in his opinion (R. 713) has referred to certain cases in which it is stated that a rule of court has the force of law. But granting this premise, the conclusion does not follow that a rule regulating practice, or directory in its nature, or assigning business as between Judges or parts of Court touches the *jurisdiction* of the Court itself or of the presiding Judge.

Furthermore, in the cases cited by Judge Woolsey it will be found that one or the other of the parties objected to the disregard or violation of the rule. Such cases can have no bearing upon the present instance where all parties to the Brake Shoe suit raised, and now raise, no such objection.

## POINT VI.

**Judge Woolsey's lack of power to make any order in the Johnson suit vacating Judge Manton's orders in the Brake Shoe suit was not affected by the Consolidation Order, since even if the Consolidation Order were proper it could not result in merging the two suits into one cause. The independent and separate existence of the two suits could not be affected by consolidation.**

**Moreover, Judge Woolsey could not do by indirection what he could not do by direction. Since he had no power in the Johnson suit to vacate orders in the Brake Shoe suit, he could not clothe himself with such power by forcibly reaching over into Judge Manton's court and possessing himself of the Brake Shoe suit by the alleged process of consolidation.**

**Furthermore, applying Judge Woolsey's own reasoning, his action was a violation of Equity Rule 4 of the Southern District of New York.**

(1) In his opinion Judge Woolsey stated that there was in his mind "a residuum of doubt" whether so long as the Brake Shoe suit and the Jonhson suit remained separate causes an order could properly be made in the Johnson suit which would affect the receivership orders and the other orders made in the Brake Shoe suit (R. 710-711). Further in his opinion Judge Woolsey concludes that he could avoid such difficulty by consolidating the two suits (R. 710-711), and accordingly he made the Consolidation Order (R. 722-724).

The consolidation by Judge Woolsey of the Brake Shoe suit and the Johnson suit, even if effective, did not accom-

plish a merger of the two suits. The suits remained separate, distinct, and independent suits. The consolidation could not affect the rights of the parties in either suit. Such a consolidation is merely a procedural expedient for the sake of convenience and economy. Since the suits remained separate and independent an attempt in one of them to attack proceedings in the other is a collateral attack. The attacks on Judge Manton's orders were made by the complainants in the Johnson suit. The Consolidation Order did not make the complainants in the Johnson suit parties to the Brake Shoe suit nor to any one cause of which the Brake Shoe suit was a constituent part, and accordingly it did not give to the complainants in the Johnson suit any standing to attack the orders in the Brake Shoe suit. As said below in the opinion of Circuit Judge Hand (R. 1034):

> "Consolidation does not merge the suits; it is a mere matter of convenience in administration, to keep them in step."

The rule regarding the operation and effect of consolidation of actions in equity causes and in the Federal courts is stated as follows:

> "It is ordinarily held that the effect of a consolidation of suits in equity is different from the effect of a consolidation at law, and amounts practically to no more than a trial of the different suits at the same time. The cases preserve their separate identity, and are to be determined exactly as if they were heard separately. The consolidation does not make the parties in one suit parties to the other, or change the issues in the respective cases, or alter the rights of the parties, which must still turn upon

the pleadings, proof and proceedings in the respective cases. * * *" (1 C. J. 1137 [Actions] §353).

"In the federal courts, although the statutes expressly authorize them to 'consolidate' actions, the effect of the so-called consolidation differs from that above stated, in the case of a technical consolidation at law, and, as in the equity practice, amounts to no more than a trial of the several actions together. Under the practice in these courts each of the several actions consolidated preserves its separate identity, and while they are all tried together, each is treated as a separate action and different verdicts and judgments or decrees are rendered." 1 C. J. 1137 [Actions] §358).

In *Toledo, etc., R. R. Co.* v. *Continental Trust Co.*, 95 Fed. 497 (C. C. A. 6th, 1899) (certiorari denied 176 U. S. 219), the court, by Lurton, J., said, at page 506:

"Such consolidation is primarily but an expedient adopted for saving costs and delay. Each record is that of an independent suit, except in so far as the evidence in one is, by order of the court, treated as evidence in both. The consolidation does not change the rules of equity pleading, nor the rights of the parties, as those rights must still turn on the pleadings, proofs, and proceedings in their respective suits. *The parties in one suit do not thereby become parties in the other,* and a decree in one is not a decree in the other, unless so directed. It operates as a mere carrying on together of two separate suits supposed to involve identical issues, and is intended to expedite the hearing and diminish the expense." (Italics ours.)

To the same effect are:

*Taylor* vs. *Logan Trust Co.*, 289 Fed. (C. C. A.) 51, 53;

*Vapor Car Heating Co.* vs. *Gold Car Heating & Lighting Co.*, 296 Fed. 201;

*E. A. Holmes & Co.* v. *U. S. Fire Insurance Co.*, 142 Fed. 863 (C. C., W. D. Tenn., 1906), at page 866;

*Nolte* v. *Hudson Nav. Co.*, 11 Fed. (2d) 680 (C. C. A. 2nd, 1926), at page 682;

*Adler* v. *Seaman*, 266 Fed. 828 (C. C. A. 8th, 1920), at page 831;

*Mutual Life Insurance Co.* v. *Hillmon*, 145 U. S. 285.

(2) The orders of Judge Manton were, as we have shown in Point IV, valid whether or not Judge Manton was a *de jure* or *de facto* judge. Their validity as such was no less after than before the attempted consolidation. The "orderly procedure" upon which Judge Woolsey so much insists seems to us, with all deference, to have been grossly disrupted by the unprecedented procedure of one district judge reaching over into the court of another judge of at least coordinate, if not superior, jurisdiction and forcibly snatching away from him, under guise of consolidation, a cause which the latter judge then had pending before him, —particularly when this *tour de force* was for the avowed purpose of clothing the former judge sitting in another suit with the alleged power not otherwise possessed to vacate the orders of the latter judge in the cause then pending before the latter.

The whole procedure was, we respectfully submit, an effort to rise into power by pulling on one's own boot straps; and was wholly inconsistent, since the observation of Judge Woolsey that the district judges must be "masters

in their own house" would, if sound, apply with far greater force to the right of Judge Manton, sitting as a district court, to be master in his own court.

This use of power to consolidate, not for the purpose of mere judicial convenience and the saving to the litigants of time and money, but for the purpose of forcibly depriving a coordinate judge of further jurisdiction over a cause *sub judice* before him, is novel in the extreme and provides a precedent for judicial conflict, the uses of which in practice may be most destructive to the dignity and peace of the courts.

(3) Furthermore, applying Judge Woolsey's own reasoning, his action was a violation of Equity Rule 4 of the Southern District of New York. This Rule provides, among other things:

> "In any suit in which a receiver is appointed the Judge who appoints the receiver shall retain supervision over the cause, including appointment of solicitors and applications for allowance."

This Rule had been submitted by the district judges to the circuit judges for approval in accordance with Supreme Court Equity Rule 79, and had been approved by the circuit judges.

Judge Woolsey concedes that he had "a residuum of doubt" that in the Johnson suit, standing alone, he could make any order which would affect any of the orders made by Judge Manton in the Brake Shoe suit (R. 710-1). This doubt was surely due to the obvious considerations that those orders were not open to any such collateral attack and were valid as the exercise of power by a judge who was at least *de facto*. Quite obviously, therefore, this

Equity Rule 4, by its very terms, deprived Judge Woolsey of power forcibly to take the Brake Shoe case away from Judge Manton who had immediately followed his two orders of August 25th by the order of August 26th appointing receivers, and who had continued his term of court for the further conduct of the cause for three years (R. 225), and who, at the time when Judge Woolsey made his order, had various matters in the Brake Shoe case *sub judice* before him.

## POINT VII.

**The question as to whether the petitioners would have any means of reviewing the validity or propriety of Judge Manton's order appointing receivers is really irrelevant. But, even if this were otherwise, the petitioners were extended by that very order an opportunity to present to him the so-called jurisdictional points which they are now urging. They were thereby furnished a forum, the privileges of which they neglected to utilize; and any adverse determination by Judge Manton they could have presented in the Circuit Court of Appeals for review.**

(1) We submit that we have shown in Point IV, *supra*, that as to third parties the orders and determinations of a *de facto* judge are not open to question on the ground that he is not a *de jure* judge.

Consequently, the question whether, as to past orders of Judge Manton, the complainant in the Johnson suit has in any form or by any means a remedy to review the said orders, is wholly immaterial to any issue in this action. If

the complainant desired to prevent future action by Judge Manton, believed by him to be illegal, his remedy was to apply for writs of certiorari, mandamus, prohibition or *quo warranto*, or possibly to appear specially or otherwise in the action and question in advance the legality of judicial acts thereafter proposed to be performed. (See Title 28, Section 377, U. S. C. A.)

In the following cases, upon application of a petitioner who was not a party to the action but who had an interest in the subject matter of the action, a writ of prohibition was granted.

> *State* v. *Calhoun*, 207 Mo. App. 149 (1920);
> *Midland Inv. Corp.* vs. *Ballard*, 101 W. Va. 591 (1926).

(2) Furthermore, it must be borne in mind that in the very order by which Judge Manton appointed temporary receivers of Interborough Rapid Transit Company on August 26, 1932, and in the subsequent order on September 6, 1932, appointing a temporary receiver for Manhattan Railway Company, he designated September 22, 1932, as a date when any creditor of either of these defendants *or any "other party in interest"* might show cause before him "why the receivership should not be continued" (R. 184, 200).

These orders were published on September 13, 1932 (R. 304), and were known to Johnson and Boehm before September 22nd, 1932, because they are referred to in the Johnson bill of complaint filed on September 21, 1932 (R. 43, 8). Thus, Judge Manton himself provided an adequate forum in which precisely the objections now made could be heard.

These orders in no way required the persons who responded thereto on the date fixed to become parties to the action or even to intervene. It expressly empowered and invited them on special or other appearance to present any reason whatever why Judge Manton should terminate or annul the receivership.

As said below in the opinion of Circuit Judge Hand (R. 1033):

> "They (Johnson and Boehm) too wished a receivership, and indeed had no objection to 'the propriety of the main proceeding,' except for the judge who was to conduct it, and the receivers appointed. As to both, they had their opportunity to appear on the return day of the rule *nisi*, September twenty-second, to ask for a removal of the cause to another judge, if the rules forbade the Circuit Judge to proceed, and for the appointment of other receivers. The bill at bar was filed on the twenty-first, a week before the decree passed continuing the receivers *pendente lite*. Nothing had happened, at least before the twenty-second, to their prejudice, and if it was wrong to proceed in the face of the rules, the objection could then have been raised."

It cannot be urged that this forum was not adequate for the reason that Judge Manton would be passing on the validity of his own judicial action. In the first place, it cannot be assumed that he would not, for that reason, give fair and full consideration to any grounds of attack which might be urged. In the second place, the presentation to himself of such objections to his order was precisely the practice urged and upheld by Judge Lacombe under identical circumstances in the *New York City Railway Company* case, 221 Fed. 440, 442.

Although the original appointments of receivers was without the giving of general notice, the temporary appointments expired with the decree, making the receiverships permanent (R. 223). Thereafter the receivers held only under that decree,—a decree, as already stated, made upon full notice to all parties including even these very petitioners (R. 1033, 1034).

(3) There is nothing in Equity Rule 37 which would prevent an appeal by a person who so presented himself in response to the invitation tendered in Judge Manton's aforesaid orders to show cause why the receiverships should not be continued.

Courts of equity frequently permit parties to appear for the special purpose of being heard upon particular questions without becoming parties to the suit or without a general intervention under Equity Rule 37 which clearly contemplates intervention as a party.

If Judge Manton's decision proved adverse, Johnson and Boehm could have appealed or could have secured writs of certiorari, mandamus or prohibition as the situation might justify.

*Mitchell* v. *Lay,* 48 Fed. (2nd) (C. C. A. 9), 79, 84, 85;

*Blake* v. *District Court,* 59 Fed. (2nd) (C. C. A. 9) 78, 79;

*Kingsport Press, Inc.* v. *Brief English Systems,* 54 Fed. (2nd) 497;

*Wood* v. *Oregon Development Co.,* 55 Fed. 901;

*Christian* v. *Hoe, Inc.,* 63 Fed. (2nd) (C. C. A.) 218.

In the *Blake* case, *supra,* the District Court had granted a receivership of the Oil Well Supply Company on a bill in equity filed by a creditor and consented to by the defendant,—precisely as in the present case. The petitioner in the *Blake* case was not a party to the action but claimed to be an oil "percent-holder." He sought a writ of certiorari for review of the order appointing the receiver on the ground that such order could not be validly made without notice to oil "percent-holders" who were not parties. The Circuit Court of Appeals for the 9th Circuit held that the petition for a writ of certiorari was premature, saying (p. 79):

> "If petitioner feels aggrieved by the order of the District Court appointing a receiver, *he should invoke the power of that court to correct the alleged error* before applying to this court for relief. See Mitchell *v.* Lay (C. C. A.) 48 F. (2d) 79."

## POINT VIII.

**The Johnson bill supplied the District Court with no jurisdiction. The plaintiff, Johnson, in his capacity as a stockholder of the Manhattan, had no standing to institute a suit for the appointment of receivers of the Interborough.**

**This absence of jurisdiction cannot be remedied by the intervening complaint of Lillian Boehm.**

(1) The Johnson suit was brought by Johnson in a derivative capacity as a minority stockholder of Manhattan in his own behalf and in behalf of such other stockholders of Manhattan as might join in the suit and become parties thereto (by leave of court) for the benefit of Manhattan

(R. 14). As regards the defendant Interborough, the only claim alleged in the suit is that of an unsecured creditor, *i. e.*, Manhattan Railway Company.

Hence, so far as the relief sought in the Johnson suit against Interborough is concerned, the plaintiff cannot invoke the equitable jurisdiction of the Federal Court for the appointment of a receiver of the Interborough because the claim alleged is that of an unsecured creditor, and there has been no waiver from the Interborough of its defense that such creditor is without a judgment or a return of execution *nulla bona,* and has an adequate remedy at law.

The appointment of receivers of the Interborough is the very essence of the Johnson bill so far as that corporation is concerned, because there is no such thing as an action in equity merely to set aside an order granted by a coordinate judge in another suit.

(2) The lack of jurisdiction in the Johnson suit could not be cured by the intervention of Lillian Boehm as a complainant therein, or by the filing of her "supplemental" bill of complaint, because:

> (a) She could only intervene as a party plaintiff in the Johnson suit in her capacity as a stockholder of Manhattan, and not as a creditor of Interborough (R. 140).
>
> (b) She is a resident of the State of New York and, therefore, in her capacity as complainant in the Johnson suit, there is no diversity of citizenship between her and the Interborough.
>
> (c) Her own "supplemental" bill of complaint sets forth an alleged cause of action by herself and in her own right as a creditor of Interborough. Accordingly, it is improperly joined in the same suit

with the Johnson bill, which sets forth a derivative stockholder's suit in the right of the Manhattan.

(d) The cause of action set forth in her "supplemental" bill of complaint is not within the jurisdiction of the District Court because of lack of diversity of citizenship.

(e) Her status in bringing her "supplemental" bill of complaint is that of a general creditor of the Interborough (R. 96); and, as such, she has no right to proceed in equity for a receiver of Interborough until judgment has been obtained by her and execution returned *nulla bona.*

(3) It is not permissible to say that because the Interborough Rapid Transit Company in the Brake Shoe suit consented to the appointment of a receiver, this consent can be used in the Johnson suit to supply the defect of jurisdiction created by the fact that Johnson is at most merely an unsecured creditor of the Interborough.

In the case of *Pusey & Jones* v. *Hanssen,* 261 U. S. 491, 500, it was held that the reason why a particular unsecured creditor might maintain a receivership action where the defendant corporation consented, was that the defendant corporation had the right to waive this defect in the right of the particular complainant to institute the action. It of course does not follow that because the defendant corporation was willing to make such a waiver in favor of some particular unsecured creditor, it was willing to do likewise in favor of all other parties claiming to be unsecured creditors,—particularly if such claim is not conceded.

This proposition was squarely held in *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77 and 640, where a defendant consented in one action to the appointment of a receiver, but

failed so to consent in the suit of an unsecured creditor. The Court held that the latter suit should have been dismissed because of "want of equity, for it was brought by an unsecured simple contract creditor" (p. 85).

## POINT IX.

**The power of the Court to appoint receivers on the suit of a simple contract creditor on consent of the defendant and the claim made in the petitioners' briefs that the Brake Shoe suit was collusive, are altogether separate and distinct matters. Neither matter is presented by this record or is before this Court.**

(1) The Johnson bill of complaint did not so much as ge that the plaintiff in the Brake Shoe suit was a simple contract creditor, and did not contain any charge that the proceeding was collusive or allege any facts from which collusion might be inferred. On the contrary it, like the Brake Shoe bill of complaint, alleged that both railways were in such financial straits that a court of equity must take over their assets and prevent their dismemberment by execution, attachment and the like (R. 1028). Johnson expressly alleged that "there is urgent necessity for the immediate appointment of receivers of Manhattan and Interborough" (R. 50).

As was said by the Circuit Court of Appeals in its opinion herein (R. 1028):

> "The plaintiffs, and those who have intervened, ask for receivers, just as do the parties to the American Brake Shoe Company suit. The dispute touches merely who shall be the receivers, and who the judge to have charge of the receivership."

So, likewise, there is no allegation or charge of collusion in the intervening bill of complaint filed by Lillian Boehm. On the contrary, that bill expressly alleges that the appointment of a receiver "is imperatively required" (R. 96). This assertion is the conclusion of a number of preceding paragraphs setting forth the financial situation of the Interborough and duplicating in phraseology much of the allegations of the Brake Shoe bill.

Neither bill demanded a dismissal of the Brake Shoe suit or challenged the jurisdiction of the District Court to proceed with it.

The only difference between the Johnson and Boehm bills on the one side, and the Brake Shoe bill on the other, is that the former charge that the act of Judge Manton in appointing receivers was *coram non judice* by reason of "Rules" 1-a and 11-a. In consequence, they prayed that his order appointing receivers and his subsequent orders be set aside and that other receivers be appointed in their place.

Indeed, Judge Woolsey himself recognized and postulated throughout his opinion that the Brake Shoe suit was properly brought and properly invoked the jurisdiction of the Court. This was inherent in his order consolidating the two suits and in the reasons given by him therefor (R. 710-1); and indeed, was expressly declared by him in his opinion (R. 712):

> "There is not any question but that this Court had jurisdiction in Equity No. 7-364 (the Brake Shoe suit) of the subject matter of the litigation, for the necessary diversity of citizenship exists and the amount involved is far more than that required by the statute.

"Furthermore, there is not any question but that this Court had personal jurisdiction of the parties in Equity No. 7-364 (the Brake Shoe suit). The Interborough Rapid Transit Company appeared generally and joined in the complainant's prayer for the appointment of a receiver and the Manhattan Railway Company intervened in the proceeding and prayed for the extension of the receivership to it.

"Thus far the usual questions of jurisdiction were solved by the parties unaided, and the cause became effective as a basis for judicial action by this Court when the papers were filed in the office of the Clerk thereof.

"When we come, however, to the making of the receivership orders there is another and a very unusual question of jurisdiction involved; that is, whether the exercise of the jurisdiction came within the judicial competence of the judge who purported to exercise it."

On the argument, Judge Woolsey stated that there was no issue of "collusion" before him and that "the *sole* question" was "the legality of Judge Manton's actions in those orders that he entered" (R. 848, 849). Counsel for the petitioners agreed with him, and Mr. Boehm stated (R. 850):

"Mr. Boehm: May it please your Honor, I think your Honor is entirely correct in stating that the *only* question involved upon this motion is whether or not Judge Manton had the power to make the two orders which have been referred to, and whether, as a result of the two orders that he made he had the power to entertain the application of the Interborough Rapid Transit Company, or rather the American Brake Shoe & Foundry Company, for the appointment of a receiver of the Interborough Rapid Transit Company, and subsequently to permit the

> intervention of the Manhattan Railway Company and the application in that action for the appointment of a receiver of the Manhattan Railway Company."

Thus, the attempt of the petitioners' counsel now to inject charges of collusion by making in their briefs assertions unsupported by their pleadings or by the record is contrary to the position which they themselves took before Judge Woolsey, and is directly contrary to their acknowledgment then made of the *sole* issue to be considered.

(2) Certainly these petitioners cannot urge that the defendant Interborough should, in the Brake Shoe suit, have sought to deny the very facts which these petitioners allege in their own bills of complaint as furnishing urgent reasons for the appointment of receivers. Those facts abundantly prove that any demand by the defendant Interborough that the Brake Shoe plaintiff should first exhaust its legal remedies would have invited irreparable injury to all those whom the defendant had a duty to protect. The allegations in the petitioners' own bills of complaint show that it was the duty of the defendant Interborough to consent to an equity receivership and not to allow its assets to become mere prizes in a creditors' race.

Indeed, the present brief for the petitioner Boehm expressly concedes (p. 26):

> "Petitioners however were not challenging the propriety of the appointment of receivers for the Interborough. They were willing to concede that a receivership for the Interborough would be proper."

Perhaps no better answer can be given to the loose charges now made in the petitioners' briefs than to quote

as follows from the brief below of Louis Boehm, counsel for Lillian Boehm, in the Circuit Court of Appeals (pp. 80-81):

> "What stronger case could be presented for the intervention of a court of equity than this? This is essentially a case where a court of equity should and must intervene to protect the rights of the company, its security holders and of the public at large.
>
> "The Interborough fully recognized the validity of this statement. It filed its confession, in the Brake Shoe case, of insolvency and its admission that a receiver is necessary for the protection of everybody concerned. This court deals with substance and not with form. That consent was not given merely for the benefit of the Brake Shoe Company to assure it of the payment of its trifling $27,000 claim. *That confession was made and that consent was given because it was to the interest of the Interborough and of every one of its stockholders and creditors, as well as of the public at large, that receivers should be appointed.*"

In consequence, the same brief on the same pages argued that this very consent (which the petitioners now charge to have been collusive) was equally available to the plaintiffs Johnson and Boehm as a waiver of their lack of a judgment or of a return of an execution *nulla bona*. To quote the conclusion of Boehm's then argument on this subject (p. 81):

> "We respectfully submit that that confession and consent was given for the benefit of all creditors and every stockholder of Interborough, as well as for the benefit of the public at large. The Brake Shoe Company certainly could not benefit any more by that consent than any other creditor."

(3) Both Johnson and Boehm themselves have, at the very best, only the position of simple contract creditors seeking an equity receivership. Hence, it scarcely lies in their mouths now to claim that the Brake Shoe Company was guilty of collusion because it too was merely a simple contract creditor.

(4) The claim in the supplemental bill of Johnson that Roberts knew long in advance of the application for a receivership of the Interborough and of the subsequent application for a receivership of the Manhattan, and that the same were brought about "pursuant to an understanding or conspiracy of which the said Roberts had knowledge" (R. 70), is neither any allegation nor proof that the institution of the Brake Shoe suit was collusive in the sense of being fraudulent either in fact or in law.

These allegations in this supplemental bill are directed throughout to the appointment of Roberts as receiver of the Manhattan,—an appointment which was not sought in the Brake Shoe suit as first instituted, for the Manhattan did not intervene therein until some ten days after its commencement (R. 180, 196).

(5) The further charge now made in the briefs of petitioners' counsel that the Brake Shoe suit was started with some ulterior purpose of bringing about an unjustifiable disaffirmance of the Manhattan lease is fully answered and negatived by the Johnson bill of complaint itself, which prays for the appointment of receivers of the Manhattan as well as of the Interborough (R. 43), and which says (R. 42):

> "Interborough's receivers are in duty bound to protect its security holders and stockholders from further heavy losses. Interborough can in all probability be saved from further loss by the disaffirm-

> ance of the lease. There is, therefore, in view of the premises an imperative, urgent and immediate need of an independent and proper receiver and/or receivers being appointed to protect the interests of the Manhattan."

Indeed, at another point the Johnson bill of complaint directly asserts that "*Manhattan should be left to its own destinies*" (R. 40).

Again, Johnson's bill further alleges (R. 39):

> "If the Manhattan lines apart from the extensions are responsible for part of this enormous deficit *the Interborough receivers must promptly disaffirm the Manhattan lease.*"

(6) Furthermore, the trustees and committees for the bondholders and noteholders who, according to the Johnson and Boehm bills of complaint, were about to institute foreclosure and seek the appointment of receivers by the state courts, have all intervened in the Brake Shoe suit and are supporting the receivership.

In consequence, all interests, including the District Court itself (R. 712), have acknowledged the full jurisdiction of the District Court in the Brake Shoe suit. Hence, no question as to the power of that court in a suit by a simple contract creditor and no question of collusion in the institution of the suit is presented by the record, is before this Court or is involved in any way in the single question which this appeal presents.

We need not, therefore, enlarge upon the further and additional considerations that the propriety of appointing receivers in a suit of a simple contract creditor, consented to by the defendant, is a question which can be raised solely

in the Brake Shoe suit itself and not in a collateral suit; and that the charge of collusion also cannot be presented collaterally.

(7) If these petitioners felt that the institution of the Brake Shoe suit or the original appointment of receivers therein was collusive, they were given ample opportunity to present their charges upon the return of the respective orders to show cause, of which orders they had ample notice. That they chose to ignore this opportunity reflects upon the good faith of their present charges and proves those charges to be irrelevant here. (See Point VII of this brief.)

(8) Moreover, since bankruptcy was not in 1932 an open remedy in the case of a railroad and since it is the duty of a railroad in the financial situation of the Interborough to preserve equality among its creditors and to hold them off in the interest of continued performance of its public service, a consent to a creditor's bill which sets forth its financial situation truly and reflects correctly the necessity for a receiver is not tainted with collusion in any actual or legal sense at all. (*Ex parte Relmar Holding Co.*, 61 Fed. (2) (C. C. A. 2nd) 941; certiorari denied, ..... U. S. .....).

## CONCLUSION.

**The decree of the Circuit Court of Appeals should be affirmed.**

Dated, New York, N. Y. April 15, 1933.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

Nos. 711 and 721.

BENJAMIN F. JOHNSON,
*Petitioner,*

*against*

MANHATTAN RAILWAY COMPANY, *et al.*,
*Respondents.*

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
*Respondent,*

*against*

INTERBOROUGH RAPID TRANSIT COMPANY,
*Respondent.*

IN THE MATTER
OF
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDING.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## SEPARATE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, on behalf of Respondent Committees acting for Interborough Rapid Transit Company 7% Secured Notes and 5% Bonds and on behalf of Respondent Guaranty Trust Company of New York, as Trustee of the Interborough 5% Mortgage.

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THE BALLOU PRESS NEW YORK

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IN THE MATTER
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PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## SEPARATE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, ON BEHALF OF:

**(1) The Committee Acting for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, which became due September 1, 1932;**

**(2) The Committee Acting for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds due January 1, 1966; and**

**(3) Guaranty Trust Company of New York, as Trustee of Interborough Rapid Transit Company First and Refunding Mortgage dated March 20, 1913, Securing the 5% Gold Bonds.**

## Introductory Statement Identifying the Above Mentioned Committees and Trustee.

The facts are sufficiently set forth in the opinion of the Circuit Court of Appeals per L. Hand, C. J., reported in 61 Fed. (2d) 934, and in briefs filed herein by counsel for the Receivers of Interborough Rapid Transit Company and for The American Brake Shoe and Foundry Company, and will therefore not be repeated in this brief, except that certain facts peculiarly pertinent to the status of the above mentioned Committees and Trust Company are here referred to.

The above mentioned Committees and Trustee, hereinafter sometimes referred to as the "Committees" and the "Trustee", were appellants in the appeals (R. 738, 759, 779) which were taken from three orders of the District Court of the Southern District of New York to the Circuit Court of Appeals for the Second Circuit. These orders were reversed by the Circuit Court of Appeals (R. 1035). The petitioner in this Court seeks to review the decision of the Circuit Court of Appeals of the Second Circuit.

The Committees became parties by intervention (R. 189, 191) to the cause in equity, in which The American Brake Shoe and Foundry Company (hereinafter called "Brake Shoe") is complainant, and the Interborough Rapid Transit Company (hereinafter called "Interborough") is defendant, on September 1, 1932, six days after the appointment of Receivers in that cause and on the date of the maturity of the Ten-Year Secured Convertible 7% Gold Notes of the Interborough outstanding in the principal amount of $31,672,100 and secured by $54,989,000 principal amount of Interborough First and Refunding Mortgage 5% Gold Bonds. Guaranty Trust Company of New York, as Trustee of Interborough First and Refunding Mortgage, was made a party to the Brake Shoe cause by order entered therein on September 28, 1932 (R. 226), which order was entered upon the petition of the Interborough Receivers of like date, praying instructions of the Court with respect to the making of certain pay-

ments of interest and taxes, and praying that Guaranty Trust Company of New York be made a party in view of its interest in the funds and property of the Interborough by reason of its being Trustee under the said Mortgage.

The First and Refunding Mortgage, dated March 20, 1913, of the Interborough, under which the above mentioned First and Refunding Mortgage 5% Gold Bonds (hereinafter called "5% Gold Bonds") are outstanding, authorized the issue of $300,000,000 principal amount of Bonds (R. 388), in order principally to obtain funds for financing the construction of the Subway lines authorized to be constructed under Contract No. 3, dated March 19, 1913, between the Interborough and The City of New York, and the construction of improvements and extensions to the Elevated lines under the so-called Interborough and Manhattan Certificates, which are also contracts with the City (R. 333).

In 1922 the Interborough issued its Ten-Year Secured Convertible 7% Gold Notes, which matured September 1, 1932, of which there are presently outstanding $31,672,100, secured by $54,989,000 principal amount of the 5% Gold Bonds. There were as of the date of the Interborough Receivers' application No. 9 (R. 329), in addition to the above mentioned $54,989,000 of pledged Bonds, $132,228,000 of 5% Gold Bonds outstanding in the hands of the public, there were in the sinking fund under the First and Refunding Mortgage $40,110,000, there were in the special trust fund of Guaranty Trust Company for future sinking fund payments $6,556,000, and there were in the Treasury of the Company, $1,169,308 of reacquired Bonds, making a total of $235,082,308 (R. 340). Due to sinking fund operations there have been changes in the above amounts which do not, however, greatly alter the picture.

Early in July of 1932, there was formally created under a Deposit Agreement the present Committee for the Ten-Year Secured Convertible 7% Gold Notes (R. 240), and the holders were advised of negotiations regarding unification and of the approaching maturity of the Notes on September 1, 1932,

and were requested to deposit their Notes. In the latter part of August, and after the appointment of Receivers of the Interborough properties on August 26, 1932, the present Committee for the First and Refunding Mortgage 5% Gold Bonds was formed under a separate Deposit Agreement, although the personnel of the Committee was and is the same as that of the 7% Note Committee, and deposits were requested in view of the appointment of such Receivers (R. 237). These two Committees are the Committees on whose behalf this brief is submitted.

The Committees for the 7% Notes and 5% Gold Bonds now each represent many millions of dollars of deposited Notes and Bonds, respectively, and undertake to speak in the interests of the holders of all of the Notes and Bonds outstanding in the hands of the public (R. 240, 237).

## ARGUMENT.

### I.

### Certiorari will be exercised with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.

The well known restraint of the Supreme Court granting writs of certiorari is a clearly defined policy of that Court and one that has been often enunciated. In the case of *American Construction Co.* v. *Jacksonville, Tampa and Key West Railway Co.*, 148 U. S. 372 (1892), the basis for the granting or refusing of such writs was fully stated. In this case, in denying a writ of certiorari, the court said (p. 382):

> "The Act [of March 3, 1891] has uniformly been so construed and applied by this court as to promote its general purpose of lessening the burden of litigation in this court, transferring the appellate jurisdiction in

large classes of cases to the Circuit Court of Appeals, and making the judgments of that court final, except in extraordinary cases."

And the court in the same case further said (p. 383):

"In the same spirit, the authority conferred on this court by the very provision on which the petitioners mainly rely, by which it is enacted that 'in any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court,' has been held to be a branch of its jurisdiction which should be *exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.*" (Italics ours.)

## II.

### The present case does not meet the requirements set by the Supreme Court for writs of certiorari.

The case is not one of "peculiar gravity" nor can it be said to be one of "general importance", however important it may seem to the unsuccessful litigants herein. If the feelings of the individual litigant were made the test, nearly every decision of the Circuit Court of Appeals would have to be reviewed by the Supreme Court, for every litigant naturally thinks that his particular situation is one of peculiar gravity. Viewed objectively, however, the present claim by the petitioner is not one of such peculiar gravity as to call for review by the Supreme Court.

The fundamental principles in this field have been laid down by the Supreme Court and in other cases in the Federal Courts cited in the decision of the Circuit Court of Appeals. The Circuit Court of Appeals has acted in accordance with these principles and applied them to the questions presented

in this case. A review of this case would not clarify the general propositions of law involved, but would be a review of the judgment of the Circuit Court of Appeals as to the manner of the application of the principles involved in their interpretation and construction of Federal Court rules and Federal statutes.

There is already "uniformity of decision" and the Circuit Court of Appeals has followed such decisions, so that a review of this case by the Supreme Court is not necessary to establish further the well established principles involved.

## III.

**The damage and injury that would result to the bondholders and noteholders represented by the committees and the trustee, all other creditors and the public, require that the petition be denied unless on the merits it is clear that it should be granted.**

Not only is there no question at issue in this proceeding as to the necessity of intervention of an equity court for the protection of creditors, but all the parties admitted the existence of such necessity. Likewise it is submitted that the necessary jurisdictional facts were and are present in the Brake Shoe cause and that the Federal Equity District Court for the Southern District of New York in the Second Judicial Circuit had from the time of its institution and now has complete and full jurisdiction over the subject matter and the parties to the Brake Shoe cause. The plaintiff in this cause sued in its own behalf and on behalf of all other creditors of the Interborough who might thereafter join in the prosecution of the suit. As above stated the Committees intervened in such cause (R. 189, 191) and the Trustee was made a party by order of the Court (R. 226), and the status of these parties is therefore that of creditors who sought the protection

of the equity court and who joined in the prayer of the complaint in such cause and asked that their rights and the rights of all creditors be ascertained and decreed. The events which took place in the two months following the appointment of the Interborough Receivers were set out in a full statement of the facts involved, in the opinion of the Circuit Court of Appeals above referred to (R. 1024), and it is submitted that this statement of facts shows that the proceedings customarily taken in suits of this character did take place for the protection of creditors from the date of the receivership, August 26, 1932, to the date of the District Court's orders, October 18, 1932 (R. 722, 725), and that such proceedings and the respective orders entered therein were of such a character as to provide substantial protection for the rights of all creditors. The administration of the Interborough properties was greatly interfered with and retarded from October 18, 1932, until December 14, 1932, when the Circuit Court of Appeals reversed the District Court's orders (R. 1035), but even during that period and particularly since then, it has progressed far and rights of innocent parties have become involved. Many of the principal events which have transpired since the above period, are set out in the appendix to the brief herein of the Interborough Receivers.

The Committees and the Trustee in intervening in the Brake Shoe cause took the only course available to protect the vast interests that they represent.

It is the cardinal duty of courts of equity to prevent persons who have acted in good faith, upon the exercise of power by the equity court while it was in possession of apparent jurisdiction, from suffering injury. *Electrical Supply Co.* v. *Put-in-Bay Waterworks, Light & Railway Company*, 84 Fed. 740 (C. C. N. D. Ohio, 1898). The grounds upon which this doctrine rests are, first, the necessity which the Court is under to defend its possession and hold the property subject to its order; and, second, the obligation it thereby assumes to itself to undertake the affording of redress to those whom it prevents by withholding the property, from

obtaining relief elsewhere. This Court has firmly indicated that where the equity courts have been administering the property of creditors under color of authority, so that the rights of innocent parties have become involved, this Court will affirm their acts or arrange for their confirmation so far as necessary to protect the rights of such parties as have relied upon a continuation of their authority. *Harkin* v. *Brundage*, 276 U. S. 36, 57 (1928).

As a result of the decision of the District Court purporting to vacate the orders in the *Brake Shoe* cause, such uncertainty resulted that the normal administration of the Interborough estate was delayed for about two months. While it is not possible to measure the damage and injury thereby caused to the Committees and other creditors, it nevertheless was real and substantial. These Committees urged upon the Circuit Court of Appeals that they were entitled to the active and affirmative exercise of the equity powers of that Court not only to dispel the uncertainties above referred to that then existed, but to afford these properties and those interested in them, including the public, that orderly administration to which they were entitled, free from all collateral disputes and controversies and interference by litigants in other suits. The Circuit Court of Appeals sustained this position by reversing the orders of the District Court, and it is submitted that if the application for writ of certiorari is granted by this Court, there will again arise the same uncertainty as previously existed which will inevitably result in substantial prejudice and injury and expense to these Committees and Guaranty Trust Company of New York as well as other creditors.

It will be noted that in spite of the tremendous public interests, as well as the large interests of these creditors and of all other creditors of the Interborough and Manhattan companies, the petitioner for the writ of certiorari has delayed making such petition from December 14, 1932 (R. 1035), the date of the entry of the orders of the Circuit Court of Appeals, until February 18, 1933.

It is respectfully submitted that this Court should not grant the application for the writ where it is so obvious that so much damage will result, unless it is perfectly clear that on the merits such application should be granted.

The points urged in I, II, and III above are all that properly need be considered in disposing of this petition for certiorari. Any examination of the merits leads to the same result and on such an examination the points successfully urged by the Committees and the Trustee and the other appellants in the Circuit Court of Appeals would again be presented. The arguments in support of these points are not here detailed, and reference is accordingly merely made to the reasoning of the Circuit Court of Appeals.

## IV.

### The reasoning of the Circuit Court of Appeals and its decision are sound and should be sustained on the merits.

Upon the merits the precise question involved in the appeals to the Circuit Court of Appeals was whether or not agreements or, as asserted, "rules" requiring litigants to make applications for a receiver to the Judge sitting in the motion part of a Federal District Court (not ratified or concurred in by a majority of the Circuit Judges or by the Senior Circuit Judge) should be regarded as mere rules of convenience, having the force of directing the method in which the business in the District Court should be conducted, or whether they should be regarded as having greater force and as being in fact jurisdictional in nature. It is submitted that the decision of the Circuit Court of Appeals is sound and conclusive in holding that the rules in question are not jurisdictional and that accordingly no collateral attack may be made upon action by a judge alleged to be in contravention of such rules.

The so-called Division of Business Order of August 25, 1932, may be disregarded as the Circuit Court of Appeals disregarded it. There remains, therefore, the question of whether the Circuit Judge had authority to act in the manner in which he did and whether there was any infirmity in his authority other than his disregard of rules 1a and 11a of the District Court for the Southern District of New York.

The Senior Circuit Judge of the Second Circuit had the power under Sections 18 and 19 of the Judicial Code to designate himself as a judge to hold a District Court for the Southern District of New York if the public interest so required, and his judgment as to the public interest is final. Such Judge so designated himself, following a practice of long standing not only in the Second Circuit, but in practically every Circuit in the United States, in a general order and in a specific order. These creditors were entitled to act on their knowledge that in consequence of the above designation the Senior Circuit Judge was holding a District Court for the Southern District of New York *de jure* and not even *de facto,* and that by the express terms of Section 18 of the Judicial Code he had "all the powers and rights, * * * of a judge of the district." These Committees had the right under Section 13 of the Judicial Code and Federal Equity Rules 1 and 6, made pursuant to Section 730 of the United States Code, to have any judge holding a District Court in the above District, exercise at all times the authority of the District Court, including the appointment of Receivers of the properties of the Interborough, and to have any District Judge, whether appointed or designated, at chambers or at any other place or time, make for their benefit all orders necessary to carry out the powers which under the law these Committees as creditors were entitled to have exercised for their benefit. These creditors had the right to assume that no agreements or "rules" of such District Court of the character of those under consideration (assuming such agreements or "rules" to have been validly adopted—which is denied) would be employed to oust or to attempt to oust the jurisdiction of a District Judge or a Circuit Judge holding a District Court.

Where the strict enforcement of any such rules which are directory in character would result in throwing into great uncertainty the substantial property interests here involved—as already resulted and is bound to recur in the event of the granting of this application for a writ—this Court, it is respectfully urged, should not review the decision of the Circuit Court of Appeals holding that such rules are merely directory and not jurisdictional in their nature, and that therefore they could not be collaterally attacked.

## V.

**The petition for writ of certiorari should be dismissed with costs.**

Dated, New York, N. Y., March 10, 1933.

Respectfully submitted,

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(1) The Committee Acting for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, which became due September 1, 1932;

(2) The Committee Acting for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds due January 1, 1966; and

(3) Guaranty Trust Company of New York, as Trustee of Interborough Rapid Transit Company First and Refunding Mortgage dated March 20, 1913, Securing the 5% Gold Bonds.

JOHN W. DAVIS,
CHESTER F. LEONARD,
Of Counsel.

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CHARLES ELMORE

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. 711 and 721.

BENJAMIN F. JOHNSON,
*Petitioner,*

*against*

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*Respondent,*

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INTERBOROUGH RAPID TRANSIT COMPANY,
*Respondent.*

IN THE MATTER
OF THE
INTERBOROUGH-MANHATTAN RECEIVERSHIP
PROCEEDINGS.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF ON BEHALF OF RESPONDENTS, the Committees acting for Interborough Rapid Transit Company 7% Secured Notes and 5% Bonds and Guaranty Trust Company of New York, as Trustee under the Interborough Mortgage securing the 5% Bonds.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

BENJAMIN F. JOHNSON,
*Petitioner,*
*against*
MANHATTAN RAILWAY COMPANY, *et al.*,
*Respondents.*

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
*Respondent,*
*against*
INTERBOROUGH RAPID TRANSIT COMPANY,
*Respondent.*

IN THE MATTER
of the
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

Nos. 711 and 721.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF ON BEHALF OF RESPONDENTS:

**(1) The Committee Acting for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, which became due September 1, 1932;**

**(2) The Committee Acting for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds due January 1, 1966; and**

**(3) Guaranty Trust Company of New York, as Trustee under Interborough Rapid Transit Company First and Refunding Mortgage dated March 20, 1913, Securing the 5% Gold Bonds.**

## Opinions Below.

The opinion of the Circuit Court of Appeals is reported in 61 F. (2d) 934 (R. 1024). The opinion of the District Court is reported in 1 F. Supp. 809 (R. 694).

## Introductory Statement Identifying the Above Mentioned Committees and Trustee.

The facts are sufficiently set forth in the opinion of the Circuit Court of Appeals, and in briefs filed herein by counsel for the Receivers of Interborough Rapid Transit Company and for The American Brake Shoe and Foundry Company, and will therefore not be repeated in this brief. Certain facts peculiarly pertinent to the status of the above mentioned Committees and Trustee are here referred to.

The above mentioned Committees and Trustee, hereinafter sometimes collectively referred to as the "Creditor Respondents" and separately as the "Committees" and the "Trustee", were appellants in the appeals (R. 738, 759, 779) which were taken from three orders of the District Court of the Southern District of New York to the Circuit Court of Appeals for the Second Circuit. These orders were reversed by the Circuit Court of Appeals (R. 1035). These respondents seek to have affirmed the decree of the Circuit Court of Appeals.

The Committees became parties by intervention (R. 189, 191) to the cause in equity, in which The American Brake Shoe and Foundry Company (hereinafter called "Brake Shoe") is complainant, and the Interborough Rapid Transit Company (hereinafter called "Interborough") is defendant, on September 1, 1932, six days after the appointment of Receivers in that cause and on the date of the maturity of the Ten-Year Secured Convertible 7% Gold Notes of the Interborough outstanding in the principal amount of $31,672,100 and secured by $54,989,000 principal amount of Interborough First and Refunding Mortgage 5% Gold Bonds. The Trustee was made a party to the *Brake Shoe* cause, by order entered

on September 28, 1932 (R. 226) upon the petition of the Interborough Receivers of like date, praying instructions of the Court with respect to the making of certain payments of interest and taxes, and praying that the Trustee be made a party in view of its interest in the funds and property of the Interborough by reason of its being trustee under the said Mortgage.

The First and Refunding Mortgage, dated March 20, 1913, of the Interborough, under which the above mentioned First and Refunding Mortgage 5% Gold Bonds (hereinafter called "5% Gold Bonds") are outstanding, authorized the issue of $300,000,000 principal amount of Bonds (R. 388), in order principally to refund certain obligations and to obtain funds for financing the construction of the Subway lines authorized to be constructed under Contract No. 3, dated March 19, 1913, between the Interborough and The City of New York, and the construction of improvements and extensions to the Elevated lines under the so-called Interborough and Manhattan Certificates, which are also contracts with the City (R. 333).

In 1922 the Interborough issued its Ten-Year Secured Convertible 7% Gold Notes, which matured September 1, 1932, of which there are presently outstanding $31,672,100, secured by $54,989,000 principal amount of the 5% Gold Bonds. There were as of the date of the Interborough Receivers' application No. 9 (R. 329), in addition to the above mentioned $54,989,000 of pledged Bonds, $132,228,000 of 5% Gold Bonds outstanding in the hands of the public, there were in the sinking fund under the First and Refunding Mortgage $40,140,000, there were in the special trust fund of the Trustee for future sinking fund payments $6,556,000, and there were in the Treasury of the Interborough, $1,169,308 of reacquired Bonds, making a total of $235,082,308 principal amount of 5% Gold Bonds (R. 340). Due to sinking fund operations there have been changes in the above amounts which do not, however, greatly alter the picture.

Early in July of 1932, there was formally created under a Deposit Agreement the present Committee for the Ten-Year Secured Convertible 7% Gold Notes (R. 240), and the holders were advised of the approaching maturity of the Notes on September 1, 1932, and of negotiations looking to a plan for the unification of rapid transit railroads and related power properties in the City of New York, and were requested to deposit their Notes. In the latter part of August, and after the appointment of Receivers of the Interborough properties on August 26, 1932, the present Committee for the 5% Gold Bonds was formed under a separate Deposit Agreement, although the personnel of the Committee was and is the same as that of the 7% Note Committee, and deposits were requested in view of the appointment of such Receivers (R. 237). These two Committees are the Committees on whose behalf this brief is submitted.

The Committees for the 7% Notes and 5% Gold Bonds each represent many millions of dollars of deposited Notes and Bonds, respectively, and intervened in the *Brake Shoe* proceedings in the interests of the holders of all of such Notes and Bonds outstanding in the hands of the public (R. 240, 237). Since 1919 various holders of the Interborough Bonds and secured notes have found it necessary to have a committee for the purpose of keeping advised of conditions as they should develop in the City of New York transit situation and of communicating from time to time to the holders of such securities information concerning the properties which are now in receivership in this case. The present Committees are composed of officers or representatives of the holders of such securities or of individuals acting as their successors due to death or resignation.

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These Creditor Respondents concur in the statement of facts and arguments set out in the briefs filed on behalf of Interborough Receivers and the Brake Shoe Company. For

this reason only certain arguments peculiarly pertinent to these Creditor Respondents are considered in detail herein.

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## Summary of Argument.

The rights given under the Federal Statutes and Federal Equity Rules to these Creditor Respondents who intervened in or were by order made a party to the *Brake Shoe* cause subsequent to the filing of the complaint cannot be impaired by rules of mere convenience.

For a more complete statement of the argument reference is made to the Index.

## I.

### The status of the *Brake Shoe* cause at the time of the intervention of the Committees and the entry of the order making the Trustee a party.

Not only is there no question at issue in this proceeding as to the necessity of the intervention of this Equity Court for the protection of creditors but all parties to these appeals admit the existence of such necessity. Likewise it is admitted that the necessary jurisdictional facts are present in the *Brake Shoe* cause. Aside from the Petitioners' belated emphasis on a charge of collusion, it is undisputed by the parties to these appeals, by the District Judge and by the Circuit Court of Appeals, that the Equity side of the District Court for the Southern District of New York, in the Second Judicial Circuit, had from the time of its institution and now has complete and full jurisdiction over the subject matter and the parties to the *Brake Shoe* cause.

The fact that the Interborough at the time of the filing of the *Brake Shoe* complaint had falling due on September 1, 1932, nearly $32,000,000 of 7% Notes and on October 1, 1932, $10,500,000 of 6% Notes, and in addition had other

debts due and owing, including substantial amounts due in respect to taxes for 1928 and 1929 duly assessed by the City of New York, and was without funds to meet these and its other obligations, clearly indicated the necessity for the intervention of the District Court (R. 161, 165). Furthermore, by reason of this financial crisis the public interest required the intervention of a Court of Equity to protect property values in excess of $600,000,000, the interests of upwards of 18,000 employees of the Interborough, the millions of passengers using daily these transportation facilities, the many thousands of holders of securities issued to obtain the funds to construct these vast transportation facilities, and in fact the interests of the hundreds of thousands of taxpayers of the City of New York by reason of the millions of dollars invested by the City in these properties.

The plaintiff in the *Brake Shoe* cause brought a suit of a civil nature in equity in which the matter in dispute exceeds the jurisdictional amount and the suit is between citizens of different states (R. 153, 169). The plaintiff in this cause sued on its own behalf and on behalf of all other creditors of the Interborough who might thereafter join in the prosecution of the suit. The Committees intervened in such cause (R. 189, 191). The Trustee was made a party thereto by order of the District Court (R. 226). The status of these Creditor Respondents is, therefore, that of large creditors who seek the protection of an Equity Court, and who have joined in the prayer of the complaint in such cause and have asked that their rights and the rights of all creditors be ascertained and decreed; that that Equity Court shall fully administer the fund in which they are interested, constituting the railways and other assets of the defendant, the Interborough, and that that Equity Court will for such purpose marshal and administer all of the assets of the defendant and ascertain the several and respective liens and priorities existing thereon and enforce by decree the rights, liens and equities of the creditors of

the defendant as the same may be finally ascertained and decreed; that pending such marshalling and administration and final decrees, for the purpose of preserving intact the property and assets of the defendant, a receiver or receivers be appointed with all the incidental powers ordinarily vested in receivers in like cases and with full power and authority to operate the railroad properties and assets of the defendant; and that pending the suit an injunction issue against the defendant and all persons, restraining them from interfering with said receiver or receivers taking possession of said property, and for such other and further relief in the premises as the nature of the case might require and as might be agreeable to equity (R. 167-169).

The prayer of the creditors of the Interborough was that a subpoena issue out of this Court directing the defendant to appear (R. 169). The defendant appeared and joined in the prayer of the complaint in this cause and asked the Equity Court to take possession of its property through the appointment of a receiver or receivers and thereby protect and preserve its property and manage, operate and control the same, and consented to the granting of the other general relief prayed for in the complaint (R. 171-173).

The principal events that have taken place in this cause are set forth in the full statement of the facts which is to be found in the brief of the Interborough Receivers. It is submitted, first, that the proceedings customarily taken in suits of this character did take place for the protection of creditors for the period of time from August 26, 1932, up to October 18, 1932, the date of the orders which were the subject of the appeals to the Circuit Court, and, second, that such proceedings and the respective orders entered subsequently in the District Court are of such a character as to provide substantial protection for the rights of all creditors.

*The Trustee was made a party by court order and the Committees in intervening in the Brake Shoe cause took the only course available to protect the vast interests which they represent.*

## II.

**Creditor Respondents and the Respondent Trustee having acted in good faith are entitled not only to the protection of the court of equity but are also entitled to have that court exercise its power so as not to cause injury to them.**

It is the cardinal rule of courts of equity to prevent persons who have acted in good faith upon the exercise of power by the equity court, while it was in possession of apparent jurisdiction, from suffering injury. *Electrical Supply Co.* v. *Put-In-Bay Waterworks, Light & Railway Company,* 84 Fed. 740 (C. C. N. D. Ohio, 1898). The grounds upon which this doctrine rests are first, the necessity which the court is under to defend its possession, and hold the property subject to its order; and, second, the obligation it thereby assumes to itself to undertake the affording of redress to those whom it prevents, by withholding the property, from obtaining relief elsewhere. This Court has repeatedly indicated that where the equity courts have been administering property of creditors under color of authority, so that the rights of innocent parties have become involved, this Court will affirm their acts so far as necessary to protect the rights of such parties as have relied on a continuation of their authority. *Harkin* v. *Brundage,* 276 U. S. 36, 57 (1928).

It is respectfully submitted that these Creditor Respondents, as well as all other creditors, are entitled to have their rights and the rights of the defendant, in whose property they have such a substantial interest, protected in the cause to which they are parties, namely, the *Brake Shoe* cause. They are entitled to the general relief granted them by the law and the rules of this Court which give to them protection against a multiplicity of suits and the right to have enjoined attempts to interfere with their property rights in other suits or proceedings.

It is respectfully urged by these Creditor Respondents that in view of these proceedings, this Equity Court is bound to

exercise its equity powers to protect and preserve the integrity of the action which has been taken in the *Brake Shoe* cause and to protect the continued exercise of the equity powers of this Court therein. The paramount rights of these Creditor Respondents compel the preservation of the integrity of the proceedings in the *Brake Shoe* cause.

## III.

### The rights of the Creditor Respondents and the Respondent Trustee under the Judicial Code and Federal Equity Rules and the effect in this proceeding of Rules 1-a and 11-a.

It is submitted that the Senior Circuit Judge was duly empowered to hold a District Court with all the rights, powers and duties of a District Judge.

That the Senior Circuit Judge of the Second Circuit had the power, under Sections 18 and 19 of the Judicial Code (28 USCA §§ 22 and 23) to designate himself as a Judge to hold a District Court in the Southern District of New York in the Second Circuit if the public interest so required is unquestioned. That the Senior Circuit Judge, having been designated to hold a District Court, became a *de jure* Judge with all of the rights, powers and duties of a District Judge is, we believe, clear, but we refer to the brief of the Interborough Receivers for a detailed and conclusive statement in this connection. Such Judge so designated himself following a practice of long standing. Congress's failure in 1922 substantially to amend this section in this respect, forcefully suggests its approval of this practice which had previously been followed, not only in the Second Circuit but in practically every Circuit in the United States. There can be no question of the validity of the designation under the first general order. Likewise we believe that the designation order of August 25, 1932, was a valid order and that the Judge's opinion as to the existence of "public necessity" must be final.

Creditor Respondents were entitled to act upon their knowledge that in consequence of designation, the Senior Circuit Judge was holding a District Court for the Southern District of New York *de jure* and not *de facto*, and that by the express terms of Section 18 of the Judicial Code he had "all the powers and rights, * * * of a Judge of the District", and under Section 19 that it was his "duty * * * to discharge all the judicial duties" for which he was appointed.

There being, in our opinion, no question but that the Senior Circuit Judge was a Judge *de jure*, the precise questions involved in these appeals (which these Creditor Respondents will not attempt to argue in detail) are

> (a) whether or not agreements or, as asserted, "rules" requiring litigants to make applications for a Receiver in equity to an assigned Judge sitting in the Motion Part of a Federal District Court are at all binding upon a Circuit Judge designated to hold a District Court in the District; and if so, whether they should be regarded as mere rules of convenience having the force of directing the method in which the business in the District Court will be conducted, or whether they should be regarded as having greater force and as being jurisdictional in nature, and
>
> (b) whether there can be an attack by independent bill if they are not jurisdictional.

Rule 1-a of the Federal District Judges attempts to limit a designated Judge to handling only such work as shall be assigned him by a Senior District Judge. The District Judge's opinion clearly indicates that Rule 11-a includes designated Circuit Court Judges. Therefore, we have the question whether Rule 11-a, as well as Rule 1-a, are in conflict with Sections 9 and 18 of the Judicial Code (28 USCA §§ 13 and 22) and Federal Equity Rules 1 and 6. If 11-a were intended merely to cover District Judges there would still be the question, though not involved in this case, of whether that rule is not only inconsistent with Section 9 but

also inconsistent with Sections 13 and 14 of the Judicial Code (28 USCA §§ 17 and 18).

It is submitted that the decision of the Circuit Court of Appeals is sound and conclusive in holding that the rules in question are not jurisdictional and that accordingly no collateral attack may be made upon action by a judge alleged to be in contravention of such rules.

(a) *Rules 1-a and 11-a* cannot have the binding force of statutes because they are inconsistent with Section 9 of the Judicial Code and Federal Equity Rules Nos. 1 and 6.*

(1) *Rules 1-a and 11-a are inconsistent with Section 9 of the Judicial Code and Federal Equity Rules Nos. 1 and 6.*

Section 9 of the Judicial Code (28 USCA § 13) is as follows:

> "Sec. 9. *Courts open as courts of admiralty and equity.* The district courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. *Any district judge* may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court." (Italics ours.)

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* *1-a.* Any judge designated to sit in the District Court for the Southern District of New York, shall do such work only as may be assigned to him by the senior district judge.

*11-a.* All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except where a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy Rules), shall be made to the judge assigned to hold the Bankruptcy and Motion Part of the business of the court and to no other judge.

The parties to the *Brake Shoe* cause, including the respondent intervenors, thus had the right to have the authority of the District Court exercised at all times by the District Judges of this District, and they had the right to have any District Judge, whether appointed or designated, at Chambers or at any place or time, make for their benefit all orders necessary to carry out the powers which they under the law were entitled to have exercised for their benefit. Otherwise, litigants having a valid cause at issue which entitles them to the relief resulting from the appointment of receivers in protection of their property interest would be subjected to great hazard in the event the District Judge holding the motion term was inaccessible, without the district, disqualified or for any other reason inaccessible to the litigants, and of losing their constitutional right to the relief afforded to them by the statutes and by the Federal Equity Rules.

Of course, the powers provided for in Section 9 of the Judicial Code must be exercised in accordance with the rule-making power of the Supreme Court of the United States as authorized by Congress (28 USCA § 730). This power is generally to regulate the whole practice to be used in suits in equity by the District Courts. Pursuant thereto there have been promulgated by the Supreme Court the rules of practice for the courts of equity of the United States. Federal Equity Rule 1 practically quotes Section 9 and is to the effect that

> "Any District Judge may * * * make * * * at chambers * * * all such * * * orders * * *."*

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*RULE 1.

*District Court Always Open for Certain Purposes—Orders at Chambers.*

The district courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning *mesne* and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein.

Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

Equity Rule 6 specifically provides

> "Each district court shall establish regular times and places * * * when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place * * * make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes * * *."*

To hold that Rules 1-a and 11-a could have the force of nullifying the provisions of Section 9 and of Equity Rules 1 and 6 would be to give greater effect to such rules than they can have. That would, in effect, nullify the provisions of the statute and the rules promulgated by this Court pursuant to the authority granted it by Congress.

> (2) *The Federal District Court for the Southern District of New York does not have the power to make rules of the character of 1-a and 11-a which would be jurisdictional and have the force of statutes.*

It has been held by this Court that no practice of the lower courts, inconsistent with its rules, can be admissible to control them.

> *The Bank of the United States* v. *Jacob White, et al.*, 33 U. S. 262 (1834).

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* RULE 6.

*Motion Day.*

Each district court shall establish regular times and places, not less than once each month, when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place, and on such notice, if any, as he may consider reasonable, make and direct all interlocutory orders, rulings and proceedings for the advancement, conduct and hearing of causes. If the public interest permits, the senior circuit judge of the circuit may dispense with the motion day during not to exceed two months in the year in any district.

This Court, referring to the jurisdiction of a court, announced,—

> "But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. * * * It is true of rules of practice prescribed by this Court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred."
>
> *Washington-Southern Co.* v. *Baltimore Co.*, 263 U. S. 629, 635 (1923).

It would seem that, *a priori*, no rule of court can in the absence of specific legislative authority enlarge or restrict the jurisdiction of a judge of such a court.

While we contend that rules 1-a and 11-a were not even rules for division of business, this question has been dealt with by several State Courts, and it has been held that rules or agreements for the division of business are not jurisdictional in nature.

In *Foley* v. *Utterback*, 196 Iowa 956, 195 N. W. 721 (1923), the Supreme Court of Iowa said (at p. 722):

> "The district court is a court of general jurisdiction, and the mere division of judicial duties by agreement of the judges does not in itself deny judicial functions to any judge of that court."

In *State* v. *Lichtenberg*, 4 Wash. 553, 30 Pac. 659 (1892), the Supreme Court of Washington used the following language (at p. 660):

> "The rules of said court in partitioning the business between the respective judges thereof should be upheld, as far as possible, in order to facilitate the orderly and convenient discharge of the business, and we have no doubt of the court's authority to classify and partition it as was done. However, there can be no question, notwithstanding this, but that each judge has all the power

> that any other judge of said court has to try any cause within the jurisdiction of said court, regardless of said apportionment."

In *White* v. *Superior Court of City and County of San Francisco*, 110 Cal. 60, 42 Pac. 480 (Cal. 1895), it was held that (at p. 482):

> "• • • whether sitting separately or together, the judges hold but one and the same court, and the jurisdiction they exercise in any cause is that of the court, and not the individual. The division into departments is purely imaginary, and for the conveniences of business and of designation. Transferring a cause for trial or disposition from one of those departments to another does not effect a change or transfer of the jurisdiction of that cause; that remains at all times in the court as a single entity."

To the same effect see also *People* v. *Barbera*, 78 Cal. App. 277, 248 Pac. 304 (Dist. Ct. App. Cal. 1926).

*(b) If Rules 1-a and 11-a are to be considered jurisdictional as rules of practice, they have not been approved as required by Equity Rule 79. Rules 1-a and 11-a are not rules of practice.*

If the agreements represented by Rule 1-a and 11-a are rules of practice adopted pursuant to Section 731 of the United States Code they have not been validly adopted, for they have not been approved, as required by Equity Rule 79, by a majority of the Judges of the Circuit Court of Appeals for the Second Judicial Circuit, notwithstanding the fact that the Rules, including those dealing with practice, to which they have been added as subdivisions, have been so submitted and approved. We, however, agree with petitioner Johnson's Brief (p. 45) that these are not rules of practice. They are mere rules made under Section 731 for conveniently handling the business of the court.

(c) *Rules 1-a and 11-a are not rules for the division of business, covered by Section 23 of the Judicial Code* (28 USCA § 27).

Petitioners have sought to claim the authority for the making of Rules 1-a and 11-a to be Section 23 of the Judicial Code as well as Section 731 of the United States Code. It is submitted that it is clear that the rules in question are not rules for the division of business. The District Judge apparently appreciating that the "division of business" referred to in Section 23 of the Judicial Code related only to temporary or periodic agreements between District Judges, supported the action of the District Court in promulgating Rules 1-a and 11-a solely on Section 731 of the United States Code. We think it clear that the District Judge was sound in this respect that the power to make rules of this character flowed from Section 731, but as to the scope of the rules and their effect we, of course, agree with the Circuit Court of Appeals and disagree with the District Judge who, while trying to minimize the seriousness of the rules, presumably in order to indicate that they were not of sufficient importance to require the concurrence of a majority of the Circuit Judges, yet held that they were jurisdictional and had the effect of making the Senior Circuit Judge a stranger and an interloper.

(d) *Rules 1-a and 11-a are not jurisdictional.*

In viewing the substantial rights of creditors one is bound to conclude that such agreements (Rules 1-a and 11-a) (or even such agreements as have technically become "rules") should not have such force in a court of equity as absolutely to control in an inelastic manner the action of the Chancellor, who has power to deal with complicated situations such as those presented by the subject matter of these appeals. It is only reasonable that the Chancellor should be at liberty to depart from the terms of rules of the character in question if in his judgment it is necessary to do so in order to serve the ends of justice. Obviously, orderly procedure requires faith-

ful adherence and the utmost respect for such rules as are here under consideration and particularly where they represent the unanimous agreement of the learned resident Judges of the District Court. But it is respectfully submitted by these Creditor Respondents that they can not reasonably be interpreted as jurisdictional in effect, and that this Court is bound to hold that such rules are merely directory and not jurisdictional. *Southern Pacific Co.* v. *Johnson*, 69 Fed. 559 (C. C. A. 9th, 1895); *Southern Pacific Co.* v. *Hamilton*, 54 Fed. 468 (C. C. A. 9th, 1893); *Matter of Benedict*, 239 N. Y. 440 (1925); *Cole, et al.*, v. *Gourlay, et al.*, 79 N. Y. 527 (1880).

## IV.

**Rules 1-a and 11-a being directory, they could not be collaterally attacked. The consolidation order could not make the parties in the *Brake Shoe* cause parties to the *Johnson* cause in order to cure the defect due to the collateral attack in this case.**

If Rules 1-a and 11-a are, as we have contended and as the Circuit Court of Appeals has held, merely directory, there could be no attack on the validity of the designation orders or the other orders made by the designated Circuit Judge in another action, and no authority was vested in the District Court to vacate in the *Johnson* cause orders entered in the *Brake Shoe* cause.

*In re Manning*, 139 U. S. 504 (1891);
*Ball* v. *U. S.*, 140 U. S. 118 (1891);
*Commercial Union of America* v. *Anglo-South American Bank*, 10 Fed. (2d), 937, C. C. A. 2d, (1925) and
*Hardy* v. *North Butte Mining Co.*, 22 Fed. 2d, 62, C. C. A. 9th, (1927).

Although the District Court held in the *Johnson* cause that the bringing of that cause was a proper means of attacking the orders of the Senior Circuit Judge, yet it indicated that it had some doubt as to its power to make orders in the *Johnson* cause effective against the parties in the *Brake Shoe* cause even though it held that Rules 1-a and 11-a were jurisdictional and further held that the orders entered in the *Brake Shoe* cause were void. It therefore entered on its own motion the so-called consolidation order. The intention probably was that by making such order in the *Johnson* cause, the consolidation of the *Brake Shoe* cause with the *Johnson* cause in such a manner would give jurisdiction over the parties in the *Brake Shoe* cause.

It is clear, we submit, that a consolidation order cannot have the effect apparently intended for it by the District Judge. This is admitted in petitioner Johnson's brief at page 70, where it is stated that "no intervention was created by the 'Consolidation Order', but each of the two causes consolidated by the order retained its full force and virtue as an independent cause."

A consolidation of equity causes is primarily but an expedient adopted for saving costs and delay. Consolidation operates as a mere carrying on together of two separate suits supposed to involve identical issues, and is intended to expedite the hearing and diminish the expense. *Brevard* v. *Summar*, 2 Heisk. 97-105; *Toledo, St. L. & K. C. R. Co., et al.* v. *Continental Trust Company, et al.*, 95 Fed. 497 (C. C. A. 6th, 1899). It is respectfully submitted that the issues in the *Brake Shoe* cause and in the *Johnson* cause do not involve identical issues and are of different character so that consolidation was not even proper. There can be no doubt that the District Judge by directing the consolidation does not thereby obtain power to make the two independent causes a single cause. The two separate constituent causes remain as independent after the order of consolidation as before. *Adler* v. *Seaman, et al.*, 266 Fed. 828 (C. C. A. 8th, 1920), cer. den., 254 U. S. 655.

## CONCLUSION.

It is submitted that the decision of the Circuit Court of Appeals is sound and conclusive in holding that the rules in question have merely the force of directing the method in which the business in the District Court should be conducted and, not being jurisdictional, accordingly no collateral attack may be made upon a judge's action alleged to be in contravention of such rules.

## V.

**The decree of the Circuit Court of Appeals should be affirmed.**

Dated, New York, N. Y., April 15, 1933.

Respectfully submitted,

JOHN W. DAVIS,
*Counsel for Respondents,*

(1) The Committee Acting for Interborough Rapid Transit Company Ten-Year Secured Convertible 7% Gold Notes, which became due September 1, 1932;

(2) The Committee Acting for Interborough Rapid Transit Company First and Refunding Mortgage 5% Gold Bonds due January 1, 1966; and

(3) Guaranty Trust Company of New York, as Trustee under Interborough Rapid Transit Company First and Refunding Mortgage dated March 20, 1913, Securing the 5% Gold Bonds.

EDWIN S. S. SUNDERLAND,
*Of Counsel.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

No. 721.

BENJAMIN F. JOHNSON,
Petitioner,
against
MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER
OF THE
INTERBOROUGH-MANHATTAN RECEIVERSHIP
PROCEEDINGS.

## BRIEF FOR RESPONDENT, INTERBOROUGH RAPID TRANSIT COMPANY, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI.

The complainant, Benjamin F. Johnson, and intervener, Lillian Boehm, in the first above-entitled suit (in Equity E 71-153) petition for a writ of certiorari to review a decree of the Circuit Court of Appeals for the Second Circuit, entered on the 14th day of December, 1932, upon

a unanimous decision reversing three decrees of the District Court of the United States for the Southern District of New York. The first decree of the District Court, entered on the 20th day of September, 1932 (R. 7), granted leave to the petitioner to file the bill of complaint in the first above-entitled Johnson suit against Manhattan Railway Company and the Receiver thereof, Interborough Rapid Transit Company and the Receivers thereof, The City of New York and American Brake Shoe and Foundry Company. The said Interborough Receivers were appointed in the second above-entitled suit, The American Brake Shoe and Foundry Company against Interborough Rapid Transit Company (hereinafter referred to as the American Brake Shoe case). The second decree, entered on the 18th day of October, 1932 (R. 722), directed the consolidation of the said suits under the caption "In the Matter of the Interborough-Manhattan Receivership Proceedings"; and the third decree, entered on the 18th day of October, 1932 (R. 725), vacated and set aside, as wholly void and of no juridical effect, the orders appointing Receivers of Manhattan Railway Company and Interborough Rapid Transit Company, and other orders made by Hon. Martin T. Manton in the District Court in the American Brake Shoe case.

**The Opinions of the Courts Below.**

The opinion delivered by United States District Judge John M. Woolsey in awarding the second and third abovementioned decrees is reported in 1 F. Supp. 809. The opinion of the Circuit Court of Appeals for the Second Circuit reversing the decrees of the District Court is reported in 61 F. (2d) 934. An opinion of Circuit Judge Manton rendered in the District Court in the American Brake Shoe case is also reported in 1 F. Supp. 820.

**Statement of the Case.**

On August 26, 1932, the American Brake Shoe and Foundry Company, a Delaware corporation, filed a bill in equity in the District Court of the United States for the Southern District of New York against this respondent, a New York railroad corporation, operating an extensive mileage of municipally-owned and privately-owned rapid transit railroads in the City of New York, alleging it to be indebted to the complainant and without financial resources to meet imminently maturing security and rental obligations in excess of $44,000,000, and asking for the appointment of receivers of the Interborough Company. An answer was filed admitting the allegations of the bill of complaint and consenting to the appointment of receivers, which appointment was made by Senior Circuit Judge Manton (R. 180), serving under a designation to hold a District Court (R. 177).

On September 21, 1932, the petitioner Johnson herein, a citizen of the State of Kentucky and shareholder of the Manhattan Railway Company, a lessor of railroads operated by this respondent, and the petitioner, Lillian Boehm, a resident of New York and a creditor, intervening, filed bills in equity in the same Court against the Manhattan and Interborough Companies, their receivers and others, which did not deny, but, on the contrary, asserted the "imperative need" for a receivership for the Interborough.

The Johnson and Boehm bills did not challenge the sufficiency of the bill in the American Brake Shoe case, the propriety of the answer, or the jurisdiction of the District Court in that suit, but alleged in substance that the orders of Judge Manton therein were *coram non judice* and wholly void, and asked that such orders be vacated and new and independent receivers be appointed (R. 13, 80).

The question involved is, as to whether or not, in a case indisputably within the jurisdiction of the District Court for the Southern District of New York, and involving the necessity for the appointment of receivers, an order appointing such receivers is void because, as contended by the petitioners, Senior Circuit Judge Manton was deprived of all jurisdiction to make any order appointing receivers by reason of rules of procedure adopted by the eight Judges of the District Court.

**Summary of the Argument.**

FIRST: Any District Judge, including a Circuit Judge designated to sit as a District Judge, has inherent power under Section 13 of Title 28 of the United States Code and the Rules of Practice for the Courts of Equity promulgated by this Court to make at chambers an interlocutory order appointing a receiver *pendente lite*.

SECOND: The right to exercise the inherent power and jurisdiction of a District Judge to make an interlocutory order appointing receivers, vested in Senior Circuit Judge Manton while serving under a designation to hold a District Court, was not abrogated or restricted by Rules 1-a and 11-a adopted by eight Judges of the District Court for the Southern District of New York.

1. Such rules have not as yet received the concurrence of any of the Circuit Judges of the Second Circuit.

2. Rules 1-a and 11-a of the District Court, even assuming that they were adopted in the manner authorized by this Court, under Equity Rule 79, can-

not be construed as depriving District Judges or Circuit Judges serving as such, of inherent jurisdictional powers.

THIRD: Rules 1-a and 11-a, adopted by the Judges of the Southern District in so far as they may be given any validity whatever, must be construed as being merely directory or procedural in character.

FOURTH: The order of Senior Circuit Judge Manton, designating himself to hold a District Court, is not open to review.

## ARGUMENT

**FIRST: Any District Judge, including a Circuit Judge designated to sit as a District Judge, has inherent power under Section 13 of Title 28 of the United States Code and the Rules of Practice for the Courts of Equity promulgated by this Court to make at chambers an interlocutory order appointing a receiver *pendente lite*.**

The petitioners make no contention that the appointment of receivers was unnecessary, that there was any impropriety in appealing to a Federal District Court therefor, or that the corporation could have done otherwise than admit the allegations of the bill of complaint in the American Brake Shoe case and consent to such appointment. In fact, the petitioners have brought an action in the same Court for similar relief.

The general character of the American Brake Shoe suit, the allegations of the bill of complaint, and the propriety of the answer admitting the same, are not questioned by the petitioners herein. Their criticism, and the ground upon which they seek a review of the proceedings herein,

is that counsel for the parties in the American Brake Shoe case, having a proper case within the jurisdiction of the District Court, applied for the appointment of receivers to a Judge who was without any power or jurisdiction whatever to grant the application. Counsel presenting this brief feels justified in characterizing this contention as extraordinary, because of what is believed to be the generally accepted view, supported by long established practice, followed particularly in the case of railroad receiverships, where continuity of operation is essential in the public interest, that applications for the appointment of temporary receivers may be entertained at chambers by any Judge of the District. The soundness of this practice is based upon the inherent chamber powers which have long been conferred upon all District Judges by the Federal Statutes and the Equity Rules promulgated by this Court.

Section 13 of Title 28 of the United States Code provides that:

> *"The district courts, * * * as courts of equity, shall be deemed always open for the purpose * * * of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein.*
>
> *Any district judge may * * * make * * * at chambers * * * all such * * * orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court."*

This Court is authorized by Congress in Section 730 of the United States Code (Rev. St. 917) "generally to regulate the whole practice, to be used, in suits in equity * * * by the district courts." Pursuant to such authority, this

Court has promulgated "Rules of Practice for the Courts of Equity of the United States," commonly referred to as the Equity Rules (226 U. S. 629).

Equity Rule 1 is a restatement of above Section 13 of the United States Code. Rule 1 repeats that "any district judge may * * * make * * * at chambers * * * all such * * * orders," etc. ("such" meaning interlocutory orders made pending the hearing of the causes).

Equity Rule 6 prescribed by this Court provides that:

> *"Each district court shall establish regular times and places * * * when motions requiring notice and hearing may be made and disposed of; but the judge may at any time and place * * * make and direct all interlocutory orders, rulings, and proceedings for the advancement, conduct, and hearing of causes. * * *"*

It is assumed that there is no question that the order of Judge Manton, sitting as a District Judge, was an "interlocutory order." This point was decided by a learned Justice of this Court, Hon. Horace H. Lurton, while serving as Circuit Judge, in the receivership case of the Pere Marquette Railroad (*Horn* v. *Pere Marquette R. Co.*, 151 Fed. 626, 637), where a receiver was appointed at chambers upon consent of the railroad company. Judge Lurton said in his opinion that *"an application for a receiver* PENDENTE LITE *is plainly within any reasonable interpretation of the third rule in equity."* That case was decided in 1907, when the third rule in equity (quoted 151 Fed., p. 636) was practically identical with the second paragraph of Rule 1 above referred to.

The power to grant substantially all forms of interlocutory relief in equity, short of actual trial of causes on the merits, at chambers, has inhered in the Judges of the District Court and also the Judges of the Circuit Court

until abolished in 1911, since the creation of those Courts, and the exercise of such jurisdiction has always constituted an important part of their work. The power was derived originally from the English Chancery practice, but the substance of Section 13 of the present Code was derived from the Act of Cong., August 23, 1842, c. 188, sec. 5, 5 Stat. 517, and appeared in Sections 574 and 638 of the Revised Statutes of 1878, defining, respectively, the power of the District Court in admiralty and equity and the power of the Circuit Court in equity to grant interlocutory orders. In the year 1842 also, this Court adopted revised Equity Rules of Practice, Rules 1 and 3 of which conferred upon any judges of the Circuit Courts, as a court of equity, power to grant interlocutory orders at chambers, which was substantially declaratory of the statute. The Judicial Code of March 3, 1911, abolished the Circuit Courts, and devolved upon the District Courts the jurisdiction in equity formerly possessed by the Circuit Courts. The substance of the foregoing provisions of the Revised Statutes was carried into Section 9 of the Judicial Code, which has been re-enacted as Section 13, Title 28 of the United States Code. At about the time of the adoption of the Judicial Code and on November 4, 1912, this Court adopted revised Equity Rules effective February 1, 1913, which, with subsequent amendments not material here, are in force to-day. Equity Rule 1 as adopted in 1912 was, in substance, a consolidation of the former Rules 1 and 3, and has not since been changed. It is declaratory of the statute with respect to jurisdiction in equity. It is significant that although the judicial sections of the former Revised Statutes and the former Equity Rules were subjected to radical revision in various respects, at the time of the adoption of the Judicial Code of 1911 and the

present Equity Rules in the following year, no substantial change was made in the powers of District Judges, as successors to the Circuit Judges, to grant interlocutory relief in equity at chambers. In addition thereto, this Court adopted a *new* Rule 6, above quoted.

Perhaps note should be made here that the former Rule 3 did not contain the clause "whenever the same are not grantable of course, according to the rules and practice of the court." When the substance of the former Rule 3, with some revision of language, was incorporated in the second sentence of the present Rule 1, at the time of the adoption of the new Equity Rules in 1912, the clause "whenever the same are not grantable of course, according to the rules and practice of the court" was added, similar language appearing in the statute (28 U. S. C. A., Title 28, Sec. 13; Judicial Code, Sec. 9). It is apparent that the phrase "according to the rules and practice of the court" has reference exclusively to motions "grantable of course," which are defined by Equity Rule 5, providing that certain motions and applications therein enumerated (which it is unnecessary to consider here) not requiring any allowance or order of the Court or of a Judge "shall be deemed motions and applications grantable of course by the clerk." The foregoing rule was derived from Rule 5 of the former Equity Rules, and it has constituted, for many years, a definition of "motions grantable of course" by the clerk.

With respect to the inherent powers or jurisdiction of a District Judge, there appears to be little or no distinction between a District Judge and a District Court. As early as 1819, Chief Justice Marshall, sitting as a Circuit Justice in the Circuit Court for the Virginia District in the case

of *United States* v. *The Little Charles*, Fed. Cases No. 15613, declared:

> "By law the District Judge alone composes the court. He is a court wherever and whenever he pleases."

The foregoing view of Chief Justice Marshall has prevailed in the Second Judicial Circuit, where, quite recently, the United States Circuit Court of Appeals declared, in the case of *Ackerson* v. *United States*, 15 Fed. (2d) 268 (1926), that "any acting judge constitutes a District Court." In that case, where a statute provided that an application for suspension of execution of sentence should be made to the "Court," it was held that there was nothing to prevent the applicant "from selecting some particular judge before whom to prefer his appeal for mercy, and nothing positive to prevent him from making the round of all the judges who may hold the court of original jurisdiction in which he was convicted." In the matter here under consideration there can be no doubt as to the right to apply to *any* District Judge for the appointment of a receiver *pendente lite*, for both the statute (United States Code, Title 28, Sec. 13) and Equity Rule 1 specifically provide that the application for interlocutory relief may be made to "*any* District Judge." It was with reference to this matter that the Supreme Court, in the case of *Abbott* v. *Brown*, 241 U. S. 606 (1916), commenting upon Section 13 of Title 28 of the United States Code, stated (at p. 611):

> "The statutory provisions referred to are designed to render the District Courts readily accessible to applicants for justice in all branches of the jurisdiction."

There can be no question that a Circuit Judge, designated to hold a District Court under Section 22 of Title 28 of the United States Code (Judicial Code, Sec. 18), has the right to exercise all the inherent powers of any Judge of the Southern District of New York. Section 22 provides that:

> "During the period of service of any judge designated and assigned under this chapter, he shall have all the powers, and rights, and perform all the duties of a judge of the district * * * to which he has been assigned (excepting the power of appointment to a statutory position or of a permanent designation of a newspaper or depositary of funds)."

Section 23 of Title 28 of the Code (Judicial Code, Sec. 19) provides:

> "It shall be the duty of the district or circuit judge who is designated and appointed under either of sections 17 to 22 of this title, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district."

It is significant that Section 22 of Title 28 of the United States Code confers power upon the designated Circuit Judge "to hold a *District Court*," thus investing him with all the powers incidental to the Court itself, including the power to control its procedure as far as essential to the performance of the purpose of his designation.

It follows that the order of Judge Manton was made in the exercise of authority conferred upon him by an Act of Congress and in addition it was pursuant to the Equity Rules governing practice in the District Courts.

**SECOND: The right to exercise the inherent power and jurisdiction of a District Judge to make an interlocutory order appointing receivers, vested in Senior Circuit Judge Manton while serving under a designation to hold a District Court, was not abrogated or restricted by Rules 1-a or 11-a, adopted by eight Judges of the District Court for the Southern District of New York.**

It is contended by the petitioners that Judge Manton (assuming the validity of his designation to hold a District Court) was nevertheless deprived of all jurisdiction to make any order in the American Brake Shoe case by virtue of Rules 1-a and 11-a, adopted June 30, 1932, effective the following day, by the eight District Judges. The holding of District Judge Woolsey, at the motion term, in vacating all decrees of Judge Manton in the American Brake Shoe case, was that the District Judge assigned to hold the Motion Part "was the *only Judge* of this Court who had the power or right to entertain the application for the receivership here in question at the time when it was made" (R. 718; *Johnson* v. *Manhattan Ry. Co.*, 1 F. Supp., at p. 819; italics supplied), and such seems to be the present theory of the petitioners herein, although their original bills of complaint in the Johnson suit allege that there were "other District Judges" who were able to entertain applications for equity receivership (R. 17, 99).

It is assumed to be unnecessary, upon this application, to determine, or question, the right of the Judges of the Southern District to make regulations of practice with respect to the hearing of applications for the appointment of equity receivers or other motions, the observance of which may be insisted upon by the Judges entering into the arrangement. But that the rules here under consideration did not, as contended by the petitioners, deprive

Senior Circuit Judge Manton, while serving under a designation to hold a District Court, of all judicial power or jurisdiction to appoint equity receivers in the American Brake Shoe case is clear upon two grounds:

**1. Such rules have not as yet received the concurrence of any of the Circuit Judges for the Second Circuit.**

The regulation of equity practice in the District Courts has been vested by Congress in this Court by Section 730 of Title 28 of the United States Code. The Congress has also expressly subjected the District Courts to this Court in making rules of practice in equity cases in the District Courts. The District Courts may make rules "not inconsistent with any law of the United States or with any rule prescribed by the Supreme Court under Section 730" (Sec. 731). It was specifically stated by District Judge Woolsey, who participated in making them, that General Rules 1-a and 11-a were promulgated under the power vested in the District Courts by Section 731 (R. 713; *Johnson* v. *Manhattan Ry. Co.*, 1 F. Supp., at p. 817). The only authority which this Court has given to the District Judges to make any rules governing practice in equity cases is contained in Equity Rule 79, entitled "Additional Rules by the District Court," and providing:

> "*With the concurrence of a majority of the circuit judges for the circuit,* the district courts may make any other and further rules and regulations for the practice, proceeding and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same." (Italics supplied.)

The attempted addition of Rules 1-a and 11-a to the Rules of the District Court by the eight Judges of the Southern District, purporting to become effective July 1,

1932, did not have the concurrence of a majority, or of any of the Circuit Judges for the Circuit. In fact, it appears that no formal notification of the action taken by the District Judges was given to the Circuit Judges until July 7, 1932, when Senior Circuit Judge Manton was advised that the rules in question had become "effective as of July 1, 1932." Instead of concurring therein, Judge Manton at once advised the Senior District Judge of his objections thereto, pointing out also their invalidity (*American Brake Shoe & Foundry Co.* v. *Interborough R. T. Co.*, 1 F. Supp., at p. 825).

That Rule 11-a is an equity rule seems clear, although District Judge Woolsey expressed a contrary view (R. 714; 1 F. Supp. 817). It applies expressly to "applications for the appointment of receivers in equity causes," and even the petitioner herein refers to the rules as "rules governing equity receiverships in this district" (Johnson petition, p. 3).

**2. Rules 1-a and 11-a of the District Court, even assuming that they were adopted in the manner authorized by this Court, under Equity Rule 79, cannot be construed as depriving District Judges, or Circuit Judges serving as such, of inherent jurisdictional powers.**

This Court has said that "no rule of court can enlarge or restrict jurisdiction" (*Washington-Southern Co.* v. *Baltimore Co.*, 263 U. S. 629, 635), and that it cannot itself "by rule, enlarge or restrict its own inherent jurisdiction and powers, or those of the other Courts of the United States or of a Justice or Judge of either, under the constitution and laws of the United States" (*Hudson* v. *Parker*, 156 U. S. 277, 284). What cannot be done by this Court, obviously cannot be done by inferior Courts.

No rule adopted by the Judges of the Southern District, therefore, could deprive the District Judges of their long

established power to grant applications for the appointment of receivers and other forms of interlocutory relief at chambers, expressly secured by Section 13 of Title 28 of the Code and Equity Rule 1. Furthermore, under Section 731, any rule adopted by the District Court must not be inconsistent with "any rule prescribed by the Supreme Court under Section 730." Equity Rule 6 authorizes each District Court to establish motion days and motion parts of the Court. That rule provides the authority under which the District Courts may make administrative rules for the hearing of litigated motions. Equity Rule 6 could not, and does not purport to, confer upon the District Courts any power to limit the jurisdiction over interlocutory matters to be exercised by the District Judges at chambers. On the contrary, it contains an express reservation which preserves the power of the District Judges to make at chambers all interlocutory orders affecting the advancement, conduct and hearing of causes where the application therefor is made without notice or upon such notice as the Judge prescribes.

Rule 1-a is also in conflict with Section 22 of Title 28 of the Code, which expressly states the exceptions with respect to the right of a designated Circuit Judge to exercise the powers and duties of a District Judge, namely, "the power of appointment to a statutory position or of a permanent designation of a newspaper or depository of funds." Rule 1-a, however, adds a further exception or limitation made applicable only to a "designated" Judge, to the effect that he shall do such work only as may be assigned to him by the Senior District Judge.

In another aspect, it is obvious that Rule 1-a is in direct conflict with cognate provisions of the Code. Section 24, in connection with Section 17, authorizes the Senior Circuit Judge, or in his absence, the Circuit Justice, in the

event of it appearing that a Judge of any District Court has an interest or relationship in a pending suit which renders it improper for such District Judge to sit on the trial, to designate and assign a District Judge of any District Court within the same Circuit to discharge the duties of such other District Judge so disqualified. Section 25 provides for a similar procedure, in the event of the filing of an affidavit of personal bias or prejudice on the part of the Judge before whom an action or proceeding is to be tried or heard. In the situations arising under Sections 24 and 25, it is entirely clear that the law requires the interested party to make application to the *Senior Circuit Judge* for the designation of another Judge to hear the particular case. But, under new Rule 1-a of the District Court for the Southern District, as interpreted by the petitioners herein, no such designated Judge could proceed to hear the case unless assigned thereto by the Senior District Judge, which obviously renders the rule clearly inconsistent with the purpose of the law.

**THIRD: Rules 1-a and 11-a adopted by the Judges of the Southern District, in so far as they may be given any validity whatever, must be construed as being merely directory or procedural in character.**

That Rule 11-a is a mere procedural rule or regulation of practice seems indisputable. District Judge Woolsey, in his opinion rendered at the motion term, said that it "merely tells where attorneys have to go to get a receiver appointed. * * * It simply points to the door of the room where applications for receiverships must be made" (R. 714). Upon the argument, he described it as a "calendar" rule (R. 876). As this Court said in *Abbott* v. *Brown* (241 U. S., at p. 609), it was "a mere regulation of practice, and a breach of it would be, at the utmost, a mere

error of procedure, not affecting the jurisdiction." This Court has held that many procedural rights may be waived by the parties. Thus, in a suit for the appointment of a receiver, this Court held that where neither the plaintiff nor the defendant were residents of the district in which a suit was brought, the exemption from being sued out of the district of its domicile was a privilege which was waived by the defendant appearing and consenting (*Central Trust Co.* v. *McGeorge*, 151 U. S. 129); and this Court further held in that case that the waiver was also binding upon stockholders and creditors who petitioned the Court to have the order appointing receivers set aside on the ground of fraud and lack of jurisdiction. In *St. Louis & San Francisco Ry. Co.* v. *McBride*, 141 U. S. 127, this Court said (at p. 130) that a general appearance to the merits, if the case was one of which the Court could take jurisdiction, "waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought."

Counsel submitting this brief insists that the rules relied on by the petitioner herein did not deprive Judge Manton of jurisdiction to grant the application for the appointment of receivers in the American Brake Shoe case; but, in addition thereto, counsel desires to point out that, in joining with the counsel for the complainant in making the application to Judge Manton, he followed long-established practice, and that no disrespect for any of the Judges of the Southern District was intended. Counsel chose what was believed to be the best course to insure an orderly and just administration of a receivership involving a public service corporation and large financial interests, and in appealing to the Senior Circuit Judge, with a view of insuring the appointment of individual receivers, conceded by the petitioner herein to be proper in this case

(R. 840), counsel was exercising a privilege which seems to have been expressly contemplated by Congress in authorizing the designation of Circuit Judges to hold a District Court. It appears that, when the enactment of the Judicial Code was pending in Congress, as set forth in the Congressional Record, large equity receiverships, especially those relating to railroads, were the subject of somewhat extended discussion, and it was stated by Congressman Mann of Illinois, an influential member of the House of Representatives, that these large cases "were handled mostly in chambers"; and it was further pointed out, in the course of the debate, in answer to doubts raised as to the advisability of the abolition of the jurisdiction of the Circuit Courts over such receiverships, which was brought about by the adoption of the Judicial Code, that, while the Circuit Courts, as such, would no longer exercise jurisdiction, provision had been made under the proposed Section 18 (now 22) of the Code, which would allow Circuit Judges to appoint and control receiverships under designation by the Chief Justice, Circuit Justice or Senior Circuit Judge (46 *Congressional Record*, Part I, pp. 89, 304).

Counsel respectfully insists that he acted well within the rights of the corporation which he was representing in assuming that Rules 1-a and 11-a, which were put in operation over night, could not, and were not intended to, have the effect of suddenly rendering absolutely invalid and unlawful a recognized practice of many years' standing, namely, that of applying to any available Judge of the District Court at chambers, for the appointment of receivers in a proper case, upon consent of the parties, and the further practice of making application to the Senior Circuit Judge for a designation of a Circuit Judge to assume charge of an important proceeding.

**FOURTH: The order of Senior Circuit Judge Manton, designating himself to hold a District Court, is not open to review.**

The petitioners argue at length that there was no "public interest" which authorized Senior Circuit Judge Manton to hold a District Court, and that, therefore, the order of designation was wholly unauthorized and void.

Judge Woolsey held that he could not vacate the order of designation for "want of jurisdiction." Neither the petitioner Johnson nor the petitioner Boehm appealed from that part of his order which denied their motion in that respect. The Circuit Court of Appeals therefore did not have the question before it.

## CONCLUSION.

This respondent respectfully insists that the petitioners have shown no "special and important reasons" which call for a review by this Court of the decision of the Circuit Court of Appeals in this case, but are merely seeking another hearing upon questions thoroughly argued and fully considered in the Court below. This is not a sufficient ground to justify the granting of the writ (*Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163).

**The petitions of the complainant Johnson and the intervener Boehm for review on writ of certiorari should be denied.**

Respectfully submitted,

JAMES L. QUACKENBUSH,
Counsel for Respondent,
Interborough Rapid Transit Company.

LOUIS S. CARPENTER,
J. OSGOOD NICHOLS,
of Counsel.

FILE COPY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 711 AND 721.

BENJAMIN F. JOHNSON,
*Petitioner,*
LOUIS A. BOYER,
*Petitioner-Intervenor,*
*against*
MANHATTAN RAILWAY COMPANY, *et al.*
*Respondents.*

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
*Respondent,*
*against*
INTERBOROUGH RAPID TRANSIT COMPANY,
*Respondent.*

IN THE MATTER
OF THE
INTERBOROUGH-MANHATTAN RECEIVERSHIP
PROCEEDINGS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF ON BEHALF OF RESPONDENT, INTERBOROUGH RAPID TRANSIT COMPANY.


JAMES L. QUACKENBUSH,
*Counsel for Respondent,*
*Interborough Rapid Transit Company.*

LOUIS S. CARPENTIER,
J. OSGOOD NICHOLS,
*of Counsel.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

NOS. 711 AND 721.

BENJAMIN F. JOHNSON,
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against

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THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
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IN THE MATTER
OF THE
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF FOR RESPONDENT, INTERBOROUGH RAPID TRANSIT COMPANY.

This is a review upon writs of certiorari, granted upon the petitions of the complainant, Benjamin F. Johnson, and

intervener, Lillian Boehm, in the first above-entitled suit, of a decree of the Circuit Court of Appeals for the Second Circuit, entered on the 14th day of December, 1932, upon a unanimous decision reversing three decrees of the District Court of the United States for the Southern District of New York. The first decree of the District Court, entered on the 20th day of September, 1932 (R. 7), granted leave to the petitioner to file the bill of complaint in the first above-entitled Johnson suit against Manhattan Railway Company and the Receiver thereof, Interborough Rapid Transit Company and the Receivers thereof, The City of New York and American Brake Shoe and Foundry Company. The said Receiver of Manhattan Railway Company and Receivers of Interborough Rapid Transit Company were appointed in the second above-entitled suit, *The American Brake Shoe and Foundry Company against Interborough Rapid Transit Company* (hereinafter referred to as the *American Brake Shoe* case). The second decree, entered on the 18th day of October, 1932 (R. 722), directed the consolidation of the said suits under the caption *"In the Matter of the Interborough-Manhattan Receivership Proceedings"*; and the third decree, entered on the 18th day of October, 1932 (R. 725), vacated and set aside, as wholly void and of no juridical effect, the orders appointing Receivers of Manhattan Railway Company and Interborough Rapid Transit Company, and other orders made by Hon. Martin T. Manton in the District Court in the *American Brake Shoe* case. Thereupon, and on the 20th day of October, 1932, the parties to the *American Brake Shoe* case, the Receivers appointed therein, and various interveners therein, appealed from each of the above-mentioned decrees rendered in the District Court to the Circuit Court of Appeals for the Second Circuit,

where the appeal was heard on the 14th day of November, 1932, upon oral argument resulting in the decision and decree here under review.

## The Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Second Circuit reversing the decrees of the District Court is reported in *61 F. (2d) 934*. The opinion delivered by United States District Judge John M. Woolsey in awarding the second and third above-mentioned decrees is reported in *1 F. Supp. 809*.

## Statement of the Case.

Interborough Rapid Transit Company is a railroad corporation organized under the laws of the State of New York for the purpose of operating rapid transit railroads in the City of New York (R. 154). For many years it has been engaged in operating a large system of municipally-owned subways constructed partially at the expense of the Interborough Company under contracts with the City of New York (R. 154-156).

Manhattan Railway Company, also a railroad corporation organized under the laws of the State of New York, is the owner of a system of elevated railroads in the City of New York. In the year 1903 the Manhattan Company leased its system to the Interborough Company, which thereafter, until the appointment of the Receivers here involved, was engaged in the operation of said Manhattan elevated leased system, together with certain elevated extensions constructed and owned by the Interborough Company (R. 156-157). The Interborough

Company had engaged in the operation of its combined system a staff of officials and employees numbering more than 18,000 (R. 176, 561). The continued and safe operation of the elevated and subway lines is of vital importance to the people of the City of New York, a total of more than 1,000,000,000 passengers having been carried during the preceding year upon the rapid transit railroads operated by the Interborough (R. 166, 561). The investment of the City of New York alone in municipally-owned subway lines operated by the Interborough Company is reliably stated to be in excess of $300,000,000 (R. 561).

On August 26, 1932, the American Brake Shoe and Foundry Company, a Delaware corporation, filed a bill in equity in the District Court of the United States for the Southern District of New York, against the Interborough Company, alleging that the defendant was indebted to it in the sum of $27,530.89, payment of which had been refused (R. 164), and setting forth that the Interborough Company had outstanding Ten-Year Secured Convertible Seven Per Cent. Gold Notes, principal $31,672,100, and interest $1,108,523.50, due September 1, 1932, and Ten-Year Unsecured Six Per Cent. Gold Notes, principal $10,500,000, and interest $315,000, due October 1, 1932 (R. 159, 165). The bill of complaint further set forth various additional items of indebtedness of the Interborough Company, including certain specific interest, rental and sinking fund obligations amounting to upwards of $5,500,000 accruing at different times not later than January 1, 1933, and also sundry large public and contractual obligations of a pecuniary nature (R. 158-166). While it appeared that the Interborough Company had assets which at a fair valuation exceeded the amount of its liabilities (R. 166), it was alleged, in substance, that the company was clearly without financial resources to meet the fore-

going imminently maturing security and rental obligations, aggregating more than $44,000,000, in the ordinary course of business as they became due (R. 165-166). The bill asked, therefore, for the appointment of receivers of the Interborough Company (R. 168). On the same day, the Interborough Company filed its answer admitting the allegations of the bill of complaint and consenting to a decree appointing receivers (R. 171). The filing of this answer was authorized and directed by a resolution of the board of directors of the Interborough Company adopted August 25, 1932, setting forth particularly as a reason therefor the maturity of $31,672,100 of the 7% notes of the Company on September 1, 1932, which, as was further specifically stated in the resolution of the board of directors, the Company would be unable to pay and which probably could not be extended (R. 173). In this connection it should be pointed out that an element which may be assumed to have influenced materially this action of the board of directors was the fact that the Courts of the State of New York had sustained the right of individual holders of these notes to bring suit thereon against the Company (*General Investment Co.* v. *Interborough R. T. Co.*, 200 App. Div. 794; affd. 235 N. Y. 133), by reason of which, after September 1, 1932, the company would have been threatened with numerous suits on the part of noteholders. At the same time, counsel submitting this brief on behalf of the Interborough Company, who had been attorney and counsel for that company for the past twenty-five years, being of opinion that the adequate management and operation of the extensive subway and elevated railroads of the Interborough system, the public relations, interests of the City of New York, and various complex questions involved in the administration of an equity receivership for the company

demanded the services of individual receivers, made an affidavit to that effect (R. 175). The foregoing bill of complaint, answer and affidavit were submitted to Hon. Martin T. Manton, Senior Circuit Judge of the Second Circuit, by counsel for the complainant and for the Interborough Company, who stated the facts, showing the urgent necessity for the appointment of individual receivers. Acting pursuant to Section 22 of Title 28 of the United States Code, Judge Manton made an order, under date of August 25, 1932, designating and assigning himself "to hold a District Court of the United States for the Southern District of New York, Second Judicial Circuit, during the period beginning August 25, 1932, and particularly to hear and determine all applications and proceedings in the matter entitled American Brake Shoe and Foundry Co. vs. Interborough Rapid Transit Company," the designation containing the usual recital of "public interest" (R. 177). Upon the filing of the bill of complaint and answer on August 26, 1932, in the *American Brake Shoe* case, Judge Manton made an order appointing Hon. Victor J. Dowling and Thomas E. Murray, Jr., as temporary receivers of the Interborough Company therein (R. 180), which appointment was continued by order of September 28, 1932 (R. 223). On the same day, a bill of complaint for the appointment of ancillary receivers of the Interborough Company was filed by The American Brake Shoe and Foundry Company in the District Court for the Eastern District of New York, in which District many miles of subway railroads operated by the Interborough Company are located (R. 574), and, upon such bill and an answer admitting the allegations thereof and consenting to such appointment, Judge Dowling and Mr. Murray were also appointed temporary ancillary receivers

in that District by United States District Judge Marcus B. Campbell (R. 583). Thereafter, representatives of the principal creditors of the Interborough Company intervened in the suit, as did also the Manhattan Railway Company, a receiver of the latter company being appointed upon allegations showing the necessity therefor.

On September 21, 1932, the petitioner, Benjamin F. Johnson, a citizen of the State of Kentucky and a shareholder of Manhattan Railway Company, upon obtaining leave from United States District Judge Francis G. Caffey (R. 7), filed his bill of complaint in the first above-entitled action in the District Court for the Southern District of New York (R. 13) against the Manhattan Railway Company, the parties to the *American Brake Shoe* case, the receivers appointed therein, and the City of New York; and, on the same day, the petitioner, Lillian Boehm, a citizen of the State of New York, alleging herself to be a holder of stock and bonds of Manhattan Railway Company and bonds and notes of the Interborough Company, was permitted to intervene in said Johnson suit (R. 137, 139). The Johnson suit is in equity, and the bill of complaint (R. 13) sets forth the financial obligations of the Interborough Company (R. 22-23) and avers that "there is special and imperative need for having receivers for the Interborough and Manhattan" (R. 24), but alleges that such receivers should be "independent and disconnected with the old management of said companies." The bill further sets forth the pendency of the *American Brake Shoe* suit and does not question the truth or sufficiency of the allegations of the bill of complaint showing therein the necessity for the appointment of receivers of the Interborough Company; but the Johnson bill alleges that the designation of Senior Circuit Judge Manton to hold a District Court was unauthorized, and that the appointment

of receivers in the *American Brake Shoe* suit was "irregular, without warrant or legal authority, and void," on the ground that it was made in violation of two rules promulgated by the United States District Court for the Southern District of New York, which rules are set forth in full in the bill (R. 16). The Johnson bill further alleges that, at the time of the application for the appointment of receivers of the Interborough on August 26, 1932, and the later application for receivers of the Manhattan, "there was a United States District Judge duly assigned and sitting in the Motion Part of the Court, *as well as other District Judges of the United States District Court who were ready, able and willing to entertain the applications for equity receiverships of said Interborough and Manhattan*" (R. 17).* The Johnson bill further alleges that "*there is a grave and dangerous possibility of said receiverships of Interborough and Manhattan being set aside*, inasmuch as Circuit Court Judge Martin T. Manton had no power or jurisdiction to entertain said receivership proceedings" (R. 36), and the relief asked is that the orders of Judge Manton in the *American Brake Shoe* case be vacated, and that the Court appoint "independent receivers" of the Interborough and Manhattan, and that an accounting between those companies be had. The bill of complaint of the intervener, Lillian Boehm, also sets forth, without substantial variation from the allegations of the bill of complaint in the *American Brake Shoe* suit, the various obligations of the Interborough, which it alleges the Interborough "is and will be without financial resources to meet" (R. 87-94); that, "unless some definite action is taken on behalf of all the creditors so that the operations of said railroads may be continued, great and severe loss and irreparable injury will be inflicted upon

* Italics in this brief are supplied, unless otherwise indicated.

all creditors; that the credit of the defendant Interborough has been seriously impaired; and that it has no reasonable hope of finding assistance from any quarter" (R. 95). Accordingly, it joins with the Johnson bill in alleging the "imperative need" for the appointment of receivers of the Interborough Company (R. 97, 104), and asks for the appointment of "independent" receivers.

In short, neither the Johnson nor the Boehm bill challenged the truth or sufficiency of the bill of complaint, the propriety of the answer, or the jurisdiction of the District Court in the *American Brake Shoe* suit, but alleged, in substance, that the orders of Judge Manton therein were *coram non judice* and wholly void, asked that such orders be vacated and, upon affirmative allegations showing the necessity therefor, prayed for the appointment of new and independent receivers (R. 13, 80).

The question involved is, therefore, as to whether or not, in a case indisputably within the jurisdiction of the District Court for the Southern District of New York, and involving the necessity for the appointment of receivers, an order appointing such receivers is void because, as contended by the petitioners, Senior Circuit Judge Manton was deprived of all jurisdiction to make any order appointing receivers by reason of rules of procedure adopted by the eight Judges of the District Court.

## Summary of the Argument.

FIRST: Any District Judge has inherent power under Section 13 of Title 28 of the United States Code and the Rules of Practice for the Courts of Equity promulgated by this Court to make at chambers an interlocutory order appointing a receiver *pendente lite*.

SECOND: The right to exercise the inherent power and jurisdiction of a District Judge to make an interlocutory order appointing receivers, vested in Senior Circuit Judge Manton while serving under a designation to hold a District Court, was not abrogated or restricted by Rules 1-a and/or 11-a adopted by eight Judges of the District Court for the Southern District of New York.

1. Under express authorization of the statute, Judge Manton became vested with all of the powers and duties of a Judge of the District Court for the Southern District of New York.

2. Rules 1-a and 11-a have not as yet received the concurrence of any of the Circuit Judges of the Second Circuit.

3. Rules 1-a and 11-a of the District Court, even assuming that they were adopted in the manner authorized by this Court, under Equity Rule 79, or that they are otherwise valid as general rules of procedure in the District Court, cannot deprive District Judges, or Circuit Judges serving as such, of inherent jurisdiction to grant interlocutory relief at chambers.

THIRD: Rules 1-a and 11-a, adopted by the Judges of the Southern District, in so far as they may be given any validity whatever, must be construed as being merely directory or procedural in character, which the parties had the right to waive, and Circuit Judge Manton, as Acting District Judge, the discretionary power to suspend, in the *American Brake Shoe* suit.

The rule in the Courts of the State of New York.

FOURTH: The *American Brake Shoe* suit presented unquestioned grounds for a receivership in equity and was

brought in the utmost good faith to conserve the assets of a large public service corporation for the benefit of all interested parties.

FIFTH: The order of Senior Circuit Judge Manton, designating himself to hold a District Court, is not open to review.

The duty to perform the judicial functions prescribed in the order of designation was made mandatory by Section 23.

The order of division of business.

CONCLUSION: The decision and decree of the Circuit Court of Appeals, reversing the decrees of the District Court, should be affirmed.

## ARGUMENT

**FIRST: Any District Judge has inherent power under Section 13 of Title 28 of the United States Code and the Rules of Practice for the Courts of Equity promulgated by this Court to make at chambers an interlocutory order appointing a receiver *pendente lite*.**

That the appointment of receivers of the Interborough Company was necessary, that the corporation could not have done otherwise than admit the allegations of the bill of complaint in the *American Brake Shoe* case, and that there was no impropriety in appealing to a Federal District Court for the relief asked for, if not conceded, is certainly not disputed by the petitioners. In fact, the petitioners have brought an action in the same Court for similar relief. The general character of the *American Brake Shoe* suit, the sufficiency of the allegations of the

bill of complaint, and the propriety of the answer admitting the same, are, therefore, not questioned by the petitioners. Their criticism, and the ground upon which the petitioner Johnson asks this Court to reverse the decision of the Court of Appeals, is that counsel for the parties in the *American Brake Shoe* case, having a proper case within the jurisdiction of the District Court, applied for the appointment of receivers to a Judge who was without any power or jurisdiction whatever to grant the application. Such has been also the chief contention of the intervening petitioner, Boehm, until the filing of her brief upon the present argument, wherein she appears to largely abandon the contention (made as late as her brief in reply filed upon her application for the writ of certiorari herein, p. 8) that "Judge Manton's assumption of jurisdiction and appointment of receivers were *coram non judice*," and appeal to the broad, supervisory power of this Court to correct an alleged "improper exercise of discretion" by Judge Manton. Counsel presenting this brief feels justified in characterizing these contentions as extraordinary, because of what is believed to be the generally accepted view, supported by long established practice, followed particularly in the case of railroad receiverships, where continuity of operation is essential in the public interest, that applications for the appointment of temporary receivers may be entertained at chambers by any Judge of the District. The soundness of this practice is based upon the inherent chamber powers which have long been conferred upon all District Judges by the Federal Statutes and the Equity Rules promulgated by this Court.

Section 13 of Title 28 of the United States Code* provides:

> "The district courts, * * * as courts of equity, shall be deemed always open for the purpose * * * of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein.
>
> Any district judge may * * * make * * * at chambers * * * all such * * * orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court."

This Court is authorized by Congress in Section 730 of the United States Code (Rev. Stat. 917) "generally to regulate the whole practice, to be used, in suits in equity * * * by the district courts." Pursuant to such authority, this Court has promulgated "Rules of Practice for the Courts of Equity of the United States," commonly referred to as the Equity Rules (226 U. S. 629).

Equity Rule 1 renders the above Section 13 of Title 28 of the United States Code specially applicable to courts of equity, the Code provision applying to both courts of equity and admiralty. Rule 1 repeats that "any district judge may * * * make * * * at chambers * * * all such * * * orders," etc. ("such" meaning interlocutory orders made pending the hearing of the causes).

Equity Rule 6 prescribed by this Court provides that:

> "Each district court shall establish regular times and places * * * when motions requiring notice

* Citations of provisions of the Code herein have reference to Title 28 of the United States Code, unless otherwise indicated.

> and hearing may be made and disposed of; but the judge may at any time and place * * * make and direct all interlocutory orders, rulings, and proceedings for the advancement, conduct, and hearing of causes. * * *"

It is assumed that there is no question that the order of Judge Manton, sitting as a District Judge, was an "interlocutory order." That point was decided by a learned Justice of this Court, Hon. Horace H. Lurton, while serving as Circuit Judge, in the receivership case of the Pere Marquette Railroad (*Horn* v. *Pere Marquette R. Co.,* 151 Fed. 626, 637), where a receiver was appointed at chambers upon consent of the railroad company. Judge Lurton said in his opinion that *"an application for a receiver* PENDENTE LITE *is plainly within any reasonable interpretation of the third rule in equity."* That case was decided in 1907, when the third rule in equity (quoted 151 Fed., p. 636) was practically identical with the second paragraph of Rule 1 above referred to.

The power to grant substantially all forms of interlocutory relief in equity, short of actual trial of causes on the merits, at chambers, has inhered in the Judges of the District Court and also the Judges of the Circuit Court until abolished in 1911, since the creation of those Courts, and the exercise of such jurisdiction has always constituted an important part of their work. The power was derived originally from the English Chancery practice, but the substance of Section 13 of the present Code was derived from the Act of Congress, August 23, 1842, Chapter 188, Section 5, 5 Stat. 517, and appeared in Sections 574 and 638 of the Revised Statutes of 1878, defining, respectively, the power of the District Court in admiralty and equity and the power of the Circuit Court

in equity to grant interlocutory orders. In the year 1842 also, this Court adopted revised Equity Rules of Practice, Rules 1 and 3 of which conferred upon any judges of the Circuit Courts, as courts of equity, power to grant interlocutory orders at chambers, which was substantially declaratory of the statute. The Judicial Code of March 3, 1911, abolished the Circuit Courts, and devolved upon the District Courts the jurisdiction in equity formerly possessed by the Circuit Courts. The substance of the foregoing provisions of the Revised Statutes was carried into Section 9 of the Judicial Code, which has been reenacted as Section 13, Title 28 of the United States Code. At about the time of the adoption of the Judicial Code and on November 4, 1912, this Court adopted revised Equity Rules, effective February 1, 1913, which, with subsequent amendments not material here, are in force to-day. Equity Rule 1 as adopted in 1912 was, in substance, a consolidation of the former Rules 1 and 3, and has not since been changed. It is declaratory of the statute with respect to jurisdiction in equity. It is significant that although the judicial sections of the former Revised Statutes and the former Equity Rules were subjected to radical revision in various respects, at the time of the adoption of the Judicial Code of 1911 and the present Equity Rules in the following year, no substantial change was made in the powers of District Judges, as successors to the Circuit Judges, to grant interlocutory relief in equity at chambers. In addition thereto, this Court adopted a *new* Rule 6, above quoted.

Perhaps note should be made here that the former Rule 3 did not contain the clause "whenever the same are not grantable of course, according to the rules and practice of the court." When the substance of the former Rule 3,

with some revision of language, was incorporated in the second sentence of the present Rule 1, at the time of the adoption of the new Equity Rules in 1912, the clause "whenever the same are not grantable of course, according to the rules and practice of the court" was added, similar language appearing in the statute (28 U. S. C. A., Title 28, Sec. 13; Judicial Code, Sec. 9). It is apparent that the phrase "according to the rules and practice of the court" has reference exclusively to motions "grantable of course," which are referred to in Equity Rule 2 and defined by Equity Rule 5, providing that certain motions and applications therein enumerated (which it is unnecessary to consider here) not requiring any allowance or order of the Court or of a Judge "shall be deemed motions and applications grantable of course by the clerk." The foregoing rule was derived from Rule 5 of the former Equity Rules, and it has constituted, for many years, a definition of "motions grantable of course" by the clerk. The comma appearing after the word "course" in Section 13 and Rule 1 may be disregarded in order to give effect to the obvious meaning of the statute and rule, as was done in the case of a statute in *Hammock* v. *Loan & Trust Co.*, (1881) 105 U. S. 77, where this Court said (at p. 84):

> "While the comma after the word 'motions,' if any force be attached to it, would give the section a broader scope than it would otherwise have, that circumstance should not have a controlling influence. Punctuation is no part of the statute [citing authorities]. In the last case it was said: 'But for the punctuation, as it stands, there could be little doubt but that this was the meaning of the legislature. Courts will, however, in the construction of statutes, for the purpose of arriving at the real

> meaning and intention of the law-makers, disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute.'"

This Court said in *Ex parte Hollon Parker,* (1889) 131 U. S. 221 (at p. 225), that the chambers of a District Judge are "where he can conveniently attend to business relating to cases in his district." The effect of Section 13, Title 28 of the Code and Equity Rule 1, quoted above, as stated by the Circuit Court of Appeals for the Fourth Circuit in *Re American Home Furnishers' Corporation,* (1924) 296 Fed. 605, cert. granted 265 U. S. 578, and dismissed 266 U. S. 640, is that a Judge of a District Court of the United States "has at chambers the authority and power to make all interlocutory orders and to do everything that is necessary to speed the cause and promote justice to the parties, except the actual trial on the merits." And in *Horn* v. *Pere Marquette R. Co.,* Judge Lurton, referring to the appointment of receivers of a railroad corporation *pendente lite,* upon consent, stated (151 Fed., at p. 637):

> "The practice in the matter has, to my knowledge, never been questioned in this circuit. Why such a motion may not be entertained at chambers, in view of the conceded chamber powers of an equity judge in matters just as important, does not occur to me."

It was with reference to this matter that this Court, in the case of *Abbott* v. *Brown,* 241 U. S. 606 (1916), commenting upon Section 13 of Title 28 of the United States Code, stated (at p. 611):

> "The statutory provisions referred to are designed to render the District Courts readily accessible to applicants for justice in all branches of the jurisdiction."

And in *United States* v. *Finnell,* 185 U. S. 236, the Court, referring to the same statutory provisions as contained in Sections 574 and 638 of the Revised Statutes, said (at p. 243):

> "As will be seen from those sections, the District and Circuit Courts of the United States are always open for the transaction of certain kinds of business which, we think, may be transacted under the orders of the judge, who may at the time be absent from the place, room or building in which the court is held."

With respect to the inherent powers or jurisdiction of a District Judge, there appears to be little or no distinction between a District Judge and a District Court. As early as 1819, Chief Justice Marshall, sitting as a Circuit Justice in the Circuit Court for the Virginia District, in the case of *United States* v. *The Little Charles,* Fed. Cases No. 15613, declared:

> "By law the District Judge alone composes the court. He is a court wherever and whenever he pleases."

Judge Lurton also declared, nearly a hundred years later, in the case of *Horn* v. *Pere Marquette R. Co., supra* (at p. 636), referring to his interlocutory order, made at chambers, appointing a receiver of the property of a railroad company:

> "It must be borne in mind that the authority of the judge at chambers, and I speak altogether of a judge exercising equity powers, and not a common-law judge, or a judge administering law, as distinguished from equity, is that of the Court itself."

And in *Walters* v. *Anglo-American Mortgage & Trust Co.*, 50 Fed. 316, it was said, with reference to the Circuit Courts of the United States (at p. 317):

> "The authority of a judge at chambers is the authority of the court itself. Tindal, C. J., in *Doe dem. Prescott* v. *Roe*, 9 Bing. 104. The practice and the jurisdiction of the judge at chambers in chancery suits is in many instances so intimately blended and incorporated with the practice and jurisdiction of the court that it is sometimes difficult to separate one from the other."

The foregoing generally accepted view of Chief Justice Marshall and other Judges of the Federal Courts has prevailed in the Second Judicial Circuit, where, quite recently, the United States Circuit Court of Appeals declared, in the case of *Ackerson* v. *United States*, 15 Fed. (2d) 268 (1926), that "any acting judge constitutes a District Court." In that case, where a statute provided that an application for suspension of execution of sentence should be made to the "Court," it was held that there was nothing to prevent the applicant "from selecting some particular judge before whom to prefer his appeal for mercy, and nothing positive to prevent him from making the round of all the judges who may hold the court of original jurisdiction in which he was convicted."

In the matter here under consideration, therefore, there can be no doubt as to the right to apply to *any* District

Judge for the appointment of a receiver *pendente lite,* for both the statute (U. S. Code, Title 28, Sec. 13) and Equity Rule 1 specifically provide that the application for interlocutory relief may be made to "*any* District Judge," and it follows that such an order is made under authority conferred by an Act of Congress and is exercised pursuant to the equity rules governing practice in the District Courts, and established by this Court.

**SECOND: The right to exercise the inherent power and jurisdiction of a District Judge to make an interlocutory order appointing receivers, vested in Senior Circuit Judge Manton while serving under a designation to hold a District Court, was not abrogated or restricted by Rules 1-a or 11-a, adopted by eight Judges of the District Court for the Southern District of New York.**

The petitioners argue at some length that the order of Senior Circuit Judge Manton, designating himself to hold a District Court, under the circumstances disclosed in this case, was unauthorized and void. That contention will be considered briefly herein under a subsequent point. The present discussion assumes the validity of such designation.

**1. Under express authorization of the statute, Judge Manton became vested with all of the powers and duties of a Judge of the District Court for the Southern District of New York.**

There can be no question that, with certain immaterial exceptions, a Circuit Judge, designated to hold a District Court under Section 22 of Title 28 of the United States Code (Judicial Code, Sec. 18), has the right to exercise all the inherent powers of any Judge of the Southern District of New York. Section 22 provides:

> "During the period of service of any judge designated and assigned under this chapter, he shall have all the powers, and rights, and perform all the duties of a judge of the district * * * * to which he has been assigned (excepting the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds)."

Section 23 of Title 28 of the Code (Judicial Code, Sec. 19) provides:

> "It shall be the duty of the district or circuit judge who is designated and appointed under either of sections 17 to 22 of this title, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district."

It is significant that Section 22 of Title 28 of the United States Code confers power upon the designated Circuit Judge "to hold a *District Court*," thus investing him with all the powers incidental to the Court itself, including the power to control its procedure as far as essential to the performance of the purpose of his designation.

It is contended by the petitioners, however, that Judge Manton was nevertheless deprived of all jurisdiction to make any order in the *American Brake Shoe* case by virtue of Rules 1-a and 11-a, adopted June 30, 1932, effective the following day, by the eight District Judges. The holding of District Judge Woolsey, at the Motion Term, in vacat-

ing all decrees of Judge Manton in the *American Brake Shoe* case, was that the District Judge assigned to hold the Motion Part "was the *only Judge* of this Court who had the power or right to entertain the application for the receivership here in question at the time when it was made" (R. 718; *Johnson* v. *Manhattan Ry. Co.*, 1 F. Supp., at p. 819), and such seems to be the present theory of the petitioners herein, although their original bills of complaint in the Johnson suit allege that there were "other District Judges" who were able to entertain applications for equity receivership (R. 17, 99). The futility of this theory cannot be doubted, for two reasons:

**2. Rules 1-a and 11-a have not as yet received the concurrence of any of the Circuit Judges for the Second Circuit.**

It is assumed to be unnecessary, upon this application, to determine, or question, the right of the Judges of the Southern District to make regulations of practice with respect to the hearing of applications for the appointment of equity receivers or other motions, the observance of which may be insisted upon by the Judges entering into the arrangement. But that the rules here under consideration did not, as contended by the petitioners, deprive Senior Circuit Judge Manton, while serving under a designation to hold a District Court, of all judicial power or jurisdiction to appoint equity receivers in the *American Brake Shoe* case is clear.

The regulation of equity practice in the District Courts has been vested by Congress in this Court by Section 730 of Title 28 of the United States Code. The Congress has also expressly subjected the District Courts to this Court in making rules of practice in equity cases in the District Courts. The District Courts may make rules "not incon-

sistent with any law of the United States or with any rule prescribed by the Supreme Court under Section 730" (Sec. 731). It was specifically stated by District Judge Woolsey, who participated in making them, that General Rules 1-a and 11-a were promulgated under the power vested in the District Courts by Section 731 (R. 713; *Johnson* v. *Manhattan Ry. Co.*, 1 F. Supp., at p. 817). The only authority which this Court has given to the District Judges to make any rules governing practice in equity cases is contained in Equity Rule 79, entitled "Additional Rules by the District Court," and providing:

> "*With the concurrence of a majority of the circuit judges for the circuit,* the district courts may make any other and further rules and regulations for the practice, proceeding and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, and from time to time alter and amend the same."

"Concurrence" imports joint action, and not merely approval. "By the use of the term, something more than a mere acquiescence or silent submission is implied" (12 *C. J.* 393). When used with reference to judges of a court, the term ordinarily signifies co-ordinate powers and, obviously, this Court in requiring the "concurrence" of the Circuit Judges, or a majority of them, contemplated *joint action* on the part of the District Judges and Circuit Judges in the adoption of any rules affecting procedure in equity cases, in recognition of the powers of District Judges vested in the Circuit Judges by law, and their right and duty, upon designation, to hold a District Court.

The attempted addition of Rules 1-a and 11-a to the Rules of the District Court by the eight Judges of the Southern District, purporting to become effective July 1,

1932, did not have the concurrence of a majority of the Circuit Judges for the Circuit, as is conceded in the opinion delivered at the motion term herein by District Judge Woolsey, who was one of the Judges participating in the adoption of the rules (R. 714).

That Rule 11-a is an equity rule seems clear, although District Judge Woolsey expressed a contrary view (R. 714; *1 F. Supp. 817*). It applies expressly to "applications for the appointment of receivers in equity causes," and even the petitioner herein refers to the rules as "rules governing equity receiverships in this district" (Johnson petition, p. 3).

**3. Rules 1-a and 11-a of the District Court, even assuming that they were adopted in the manner authorized by this Court, under Equity Rule 79, or that they are otherwise valid as general rules of procedure in the District Court, cannot deprive District Judges, or Circuit Judges serving as such, of inherent jurisdiction to grant interlocutory relief at chambers.**

This Court has said that "no rule of court can enlarge or restrict jurisdiction" (*Washington-Southern Co.* v. *Baltimore Co.*, 263 U. S. 629, 635), and that it cannot itself, "by rule, enlarge or restrict its own inherent jurisdiction and powers, or those of the other Courts of the United States or of a Justice or Judge of either, under the constitution and laws of the United States" (*Hudson* v. *Parker*, 156 U. S. 277, 284). What cannot be done by this Court, obviously cannot be done by inferior Courts.

No rule adopted by the Judges of the Southern District, therefore, could deprive the District Judges of their long established power to grant applications for the appointment of receivers and other forms of interlocutory relief at chambers, expressly secured by Section 13 of Title 28

of the Code and Equity Rule 1. Furthermore, under Section 731, any rule adopted by the District Court must not be inconsistent with "any rule prescribed by the Supreme Court under Section 730." Equity Rule 6 authorizes each District Court to establish motion days and motion parts of the Court. That rule provides the authority under which the District Courts may make administrative rules for the hearing of litigated motions. Equity Rule 6 could not, and does not purport to, confer upon the District Courts any power to limit the jurisdiction over interlocutory matters to be exercised by the District Judges at chambers. On the contrary, it contains an express reservation which preserves the power of the District Judges to make at chambers all interlocutory orders affecting the advancement, conduct and hearing of causes where the application therefor is made without notice or upon such notice as the Judge prescribes. The interpretation of Rule 6 by the intervening petitioner, Boehm (Brief, p. 44), that it "deals obviously with *District Courts* and not the powers of particular *Judges*," and that it requires that "*each* District Judge shall have regular motion days, but that at the same time each District Court shall not be barred from having *some* Judge available at other times and places for the determination of the matters mentioned," is contrary to the language and plain intent of the rule, which deals with both District Courts and the powers of the Judges thereof to grant interlocutory relief—not the power of "*some*" of the Judges.

Rule 1-a is also in conflict with Section 22 of Title 28 of the Code, which expressly states the exceptions with respect to the right of a designated Circuit Judge to exercise the powers and duties of a District Judge, namely, "the power of appointment to a statutory position or of permanent designation of newspaper or depository of

funds." The exceptions specified only render more evident the legislative intent to confer *all* other powers of a District Judge upon the designee. But Rules 1-a and 11-a impose further exceptions, and, therefore, constitute legislation affecting jurisdiction and not practice. The exceptions which Rules 1-a and 11-a attempt to impose have precisely the same effect as if the exceptions stated in Section 22 were made to read, "(excepting the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds, to entertain applications for equity receiverships or to do any work whatever other than that assigned to him by the Senior District Judge)."

Section 23 renders mandatory, as has been noted, the performance of the designated duties.

*Ex parte United States*, 226 U. S. 420, 423.

In another aspect, it is obvious that Rule 1-a is in direct conflict with cognate provisions of the Code. Section 24, in connection with Section 17, authorizes the Senior Circuit Judge, or, in his absence, the Circuit Justice, in the event of it appearing that a Judge of any District Court has an interest or relationship in a pending suit which renders it improper for such District Judge to sit on the trial, to designate and assign a District Judge of any District Court within the same Circuit to discharge the duties of such other District Judge so disqualified. Section 25 provides for a similar procedure, in the event of the filing of an affidavit of personal bias or prejudice on the part of the Judge before whom an action or proceeding is to be tried or heard. In the situations arising under Sections 24 and 25, it is entirely clear that the law requires the interested party to make application to the *Senior Circuit Judge* for the designation of another Judge to hear

the particular case. But, under new Rule 1-a of the District Court for the Southern District, as interpreted by the petitioners herein, no such designated Judge could proceed to hear the case unless assigned thereto by the Senior District Judge, which obviously renders the rule clearly inconsistent with the purpose of the law.

Rules 1-a and 11-a, if given the force for which appellants contend, are jurisdictional in effect, destroy judicial powers and inhibit the exercise of duties conferred and made mandatory by express statutory provisions.

**THIRD: Rules 1-a and 11-a adopted by the Judges of the Southern District, in so far as they may be given any validity whatever, must be construed as being merely directory or procedural in character, which the parties had the right to waive, and Circuit Judge Manton, as Acting District Judge, the discretionary power to suspend, in the *American Brake Shoe* suit.**

That Rule 11-a is a mere procedural or directory rule or regulation of practice seems indisputable. The nature of the rule makes it so, notwithstanding the somewhat mandatory language in which it is phrased. In fact, District Judge Woolsey, in his opinion rendered at the motion term, said that it "merely tells where attorneys have to go to get a receiver appointed. * * * It simply points to the door of the room where applications for receiverships must be made" (R. 714). Upon the argument, he described it as a "calendar" rule (R. 876). As this Court said in *Abbott* v. *Brown* (241 U. S., at p. 609), a rule or requirement of such a nature was "a mere regulation of practice, and a breach of it would be, at the utmost, a mere error of procedure, not affecting the jurisdiction." This Court has held that many procedural rights may

be waived by the parties, not only when such rights are regulated by rule, but when they are conferred by express provision of the Federal statutes. Thus, in a suit for the appointment of a receiver, this Court held that where neither the plaintiff nor the defendant were residents of the district in which a suit was brought, the exemption from being sued out of the district of its domicile was a privilege which was waived by the defendant appearing and consenting (*Central Trust Co.* v. *McGeorge*, 151 U. S. 129); and this Court further held in that case that the waiver was also binding upon stockholders and creditors who petitioned the Court to have the order appointing receivers set aside on the ground of fraud and lack of jurisdiction. In *St. Louis & San Francisco Ry. Co.* v. *McBride*, 141 U. S. 127, this Court said (at p. 130) that a general appearance to the merits, if the case was one of which the Court could take jurisdiction, "waives not only all defects in the service, but all special privileges of the defendant in respect to the particular court in which the action is brought." There has been no rescission from the foregoing rule in later decisions of this Court. Thus in the case of *Panama R. R. Co.* v. *Johnson* (1924), 264 U. S. 375, an action was brought in the District Court of the United States for the Eastern District of New York by a seaman against his employer under Section 20 of the Act of March 4, 1915, c. 153, 38 Stat. 1185, and it was held by this Court that the District Court for the Eastern District of New York had jurisdiction to try the case, it being within the general jurisdiction conferred on the District Courts by Section 24 of the Judicial Code, and that the special statute under which the action was brought, although its language purported to define "jurisdiction," related in fact only to venue and conferred a personal privilege which was

waived by the general appearance of the defendant. Mr. Justice Van Devanter, delivering the opinion of this Court in that case, said (at p. 385):

> "By a long line of decisions, recently reaffirmed, it is settled that such a provision merely confers on the defendant a personal privilege which he may assert, or may waive, at his election, and does waive if, when sued in some other district, he enters a general appearance before or without claiming his privilege."

Likewise, as objections to the particular Court which may entertain a proceeding, within its general jurisdiction, may be waived by the parties, so failure to observe regulations as to the particular Judge who may hear a case within the jurisdiction of the Court, constitutes nothing more serious than an irregularity which may be waived by the parties with the acquiescence of the Judge. An example is presented in the early case of *Doggett* v. *Emerson*, 7 Fed. Cas. 819 (Case No. 3,961, 1845), where it was held by Justice Woodbury of this Court, sitting as a Circuit Justice in a Circuit Court held in and for the Maine District, that the validity of a decree rendered by the Presiding Judge of the Circuit Court in a case in equity could not be attacked on the ground that the case was heard and decided in vacation, where the hearing was held in vacation by agreement of the parties. In that case Mr. Justice Woodbury said (at p. 819):

> "It cannot impair the validity of the opinion and decree, that the hearing was had and they were made in the vacation. Because such is often the practice for the convenience of the parties themselves; and when assented to, as in this case, by

> them, and attended on by them, no court of law, much less of equity, could permit either of them on that account to impeach their validity. *Gould* v. *Oliver,* 2 Scott N. R. 241."

A broad rule as to the power of a Federal Court, with the consent of the parties, to waive all preliminary requirements, and entertain a case which is within the lawful power of the Court to hear and determine, was stated in *Toledo, St. L. & W. R. Co.* v. *Perenchio,* 205 Fed. 472 (1913), where various personal rights, including the issuance of a summons, were waived. In that case the Court of Appeals for the Seventh Circuit said (at p. 476):

> "Within its limitations respecting subject-matter, a federal court is a court of general jurisdiction. *If organic power to hear the controversy exists, it is immaterial when or how the parties get into court; it is enough if they do come in and waive all preliminaries to the submission of their controversy.*"

**The Rule in the Courts of the State of New York.**

Rules creating divisions or parts of the Court which may entertain motions of various classes have been in force for many years in the Supreme Court in various districts of the State of New York, particularly in the County of New York. Counsel submitting this brief feels that, in the absence of interpretative decisions in the Courts of the United States, he was warranted in assuming that Rules 1-a and 11-a, adopted by the Judges of the Southern District, could have, and were intended to have, no greater effect upon the jurisdiction of the Judges of the Court than corresponding rules regulating practice in

the State Supreme Court as interpreted by the highest Court of the State. It is also assumed that, in recognition of the general policy embodied in the Conformity Act (28 U. S. C. A., Sec. 724, formerly Rev. Stat. 914), this Court will be disposed to pay deference to these decisions interpreting regulations of practice closely analogous to the rules of the District Court here under consideration, even though such decisions may not have the force of binding or controlling precedents. As this Court said in *Barrett* v. *Virginia Ry. Co.* (1919), 250 U. S. 473 (at p. 475), quoting its earlier decision in *Nudd* v. *Burrows* (1875), 91 U. S. 426, 441, "the purpose of the provision [Rev. Stats. 914] is apparent upon its face. No analysis is necessary to reach it. It was to bring about uniformity in the law of procedure in the Federal and State Courts of the same locality."

The Constitution of the State of New York provides that the Justices designated to serve on the Appellate Division in each Department "shall have power to fix the times and places for holding Special Terms therein, and to assign the Justices in the Departments to hold such terms; or to make rules therefor" (Art. VI, Sec. 2). Pursuant to such authority the Appellate Division of the First Department, embracing New York County, has provided by rules for "Parts" of Special Terms, one for the hearing of "litigated motions," another "for *ex parte* business," and six others "for trials and for the hearing and decision of all other Special Term matters not otherwise provided for in these rules." The Appellate Divisions in the four Judicial Departments of the State have also provided by rule for the holding of Special Terms in the various other counties of the State, and in certain sections, for Special Terms, or Parts thereof, to entertain particular business, such as the hearing of "motions," "contested motions,"

"non-enumerated motions," "all *ex parte* applications," etc. These rules for the hearing of particular classes of motions before certain Parts in certain counties of the State of New York are of long standing and date back virtually to the enactment of Chapter 448 of the Laws of 1876, adopting the "Code of Remedial Justice," commonly known as the Code of Civil Procedure.

It is settled practice in the Courts of the State of New York that rules or regulations of the nature above indicated imposed by a statute or the Courts and prescribing the particular place, Judge, division or part of the Court where a motion or application may be made, do not deprive another Judge or Justice of the same Court of power to entertain the application and grant any appropriate relief within the jurisdiction of the Court.

> *People ex rel. The Mayor* v. *Nichols*, 79 N. Y. 582 (1880);
> *Matter of Petition of Argus Co.*, 138 N. Y. 557 (1893).

The matter was thoroughly litigated and considered in the two cases cited. The Court of Appeals said in the *Nichols* case that "any such regulation must be subject to the control of the justice" and that "otherwise the power of the judge would be limited, public interest sometimes put in jeopardy and the rights of citizens infringed."

For many years it was prescribed by New York statute that "a motion, upon notice, in an action in the Supreme Court, must be made within the judicial district, in which the action is triable, or in a county adjoining that in which it is triable" (Code of Civil Procedure, Sec. 769). The provision is now contained in Rule 63 of the Rules of Civil Practice. It is held, nevertheless, that parties may agree to the hearing of a contested motion before a Justice

holding a Special Term in any part of the State, the failure to observe the statutory regulation being held to be an "irregularity" only, not affecting the general jurisdiction of the Court over such motions. The foregoing rule was laid down many years ago in *Rice* v. *Ehle*, 65 Barb. 185 Supreme Court (Fourth Department, General Term, 1873; reversed on other grounds, 55 N. Y. 518). In that case a motion in an action in the Supreme Court pending in Herkimer County was, by agreement of counsel, heard at a Special Term in Saratoga County, which did not adjoin Herkimer County.

In *Matter of Wadley*, 29 Hun 12, the General Term of the Supreme Court for the Fourth Department held that upon consent of the parties, a Justice of the Supreme Court sitting in chambers had power to entertain a contested motion, although he was holding a Special Term under an order limiting it to "*ex parte* business only," the Court saying that the limitation "was for the judge's convenience only. If he saw fit to hear litigated motions brought on by consent, he could do so."

So, in *Peo.* v. *Anglo-American Savings &c. Association*, 115 App. Div. 692, the Supreme Court at Special Term in Albany County was held to have jurisdiction to entertain a motion for the passing of the accounts of a receiver in an action pending in Kings County, though contrary to the requirement of Section 769 of the Code of Civil Procedure, the making of the motion in the wrong county having been waived by the parties. In that case, the Appellate Division of the Supreme Court said (at p. 693):

> "The Supreme Court had jurisdiction; the question of the county in which the motion should be made was one of regularity only."

The general rule was stated by the Court of Appeals in *Cole* v. *Gourlay* (1880), 79 N. Y. 527, that a rule of the Court is "a mere regulation as to the practice which the Court has the power to waive, and does not affect the jurisdiction of the Court where there has been a substantial compliance with the law. * * * A mere departure from a rule of the Court does not impair the validity of the proceedings." Quite recently also, in *Matter of Benedict* (1925), 239 N. Y. 440, where a disregard of one of the Rules of Civil Practice adopted by the judiciary and the bar, pursuant to statutory authority, was held not to affect the validity of an order made in a proceeding over which the Court had jurisdiction of the subject-matter and the persons, the Court of Appeals said (at p. 445): "Failure to follow the procedure laid down by a mere court rule does not deprive the court of jurisdiction." The rule so stated is therefore of long standing in New York practice and was applied with reference to the former General Rules of Practice, which were required to be adopted by the Judges of the Supreme Court pursuant to the Code of Civil Procedure (Sec. 17), though the Code further provided that the rules should be "binding upon all the courts in this state and all the judges and justices thereof" (except the Court of Appeals and the Court for the Trial of Impeachments), and the Rules, being made under special statutory authority, were held to have the force and effect of statutes (*Matter of Moore*, 108 N. Y. 280).

We have taken the liberty of citing these numerous decisions of the Court of Appeals and lower New York Courts that it may be observed readily how well settled the New York rule is that every Justice of the Supreme Court has general Special Term powers, and neither statu-

tory provisions requiring certain motions to be made in certain counties, nor rules designating certain Special Terms, or parts thereof, to entertain specially enumerated classes of motions promulgated under the above mentioned constitutional (formerly statutory) authority can deprive a Justice holding such Special Term of jurisdiction to entertain and adjudicate other kinds of Special Term business; and the exercise of such power has been sustained in many instances.

Counsel submitting this brief insists that the rules relied on by the petitioner herein did not deprive Judge Manton of jurisdiction to grant the application for the appointment of receivers in the *American Brake Shoe* case; but, in addition thereto, counsel desires to point out that, in joining with the counsel for the complainant in making the application to Judge Manton, he followed long-established practice, and that no disrespect for any of the Judges of the Southern District was intended. Counsel chose what was believed to be the best course to insure an orderly and just administration of a receivership involving a public service corporation and large financial interests, and in appealing to the Senior Circuit Judge, counsel was exercising a privilege which seems to have been expressly contemplated by Congress in authorizing the designation of Circuit Judges to hold a District Court. It appears that, when the enactment of the Judicial Code was pending in Congress, as set forth in the Congressional Record, large equity receiverships, especially those relating to railroads, were the subject of somewhat extended discussion, and it was stated by Congressman Mann of Illinois, an influential member of the House of Representatives, that these large cases "were handled mostly in chambers"; and it was further pointed

out, in the course of the debate, in answer to doubts raised as to the advisability of the abolition of the jurisdiction of the Circuit Courts over such receiverships, which was brought about by the adoption of the Judicial Code, that, while the Circuit Courts, as such, would no longer exercise jurisdiction, provision had been made under the proposed Section 18 (now 22) of the Code, which would allow Circuit Judges to appoint and control receiverships under designation by the Chief Justice, Circuit Justice or Senior Circuit Judge (46 *Congressional Record*, Part I, pp. 89, 302-304).

Counsel respectfully insists that he acted well within the rights of the corporation which he was representing in assuming that Rules 1-a and 11-a, which were put in operation over night, could not, and were not intended to have the effect of suddenly rendering absolutely invalid and unlawful a recognized practice of many years' standing, namely, that of applying to any available Judge of the District Court at chambers, for the appointment of receivers in a proper case, upon consent of the parties, and the further practice of making application to the Senior Circuit Judge for a designation of a Circuit Judge to assume charge of an important proceeding.

**FOURTH: The *American Brake Shoe* suit presented unquestioned grounds for a receivership in equity, and was brought in the utmost good faith to conserve the assets of a large public service corporation for the benefit of all interested parties.**

The briefs filed by the petitioners herein contain broad assertions that the entire *American Brake Shoe* action is "collusive" (Johnson brief, pp. 2, 36; Boehm brief, p. 8).

The foundation of the petitioner Johnson's contention is said to be, however, that the *American Brake Shoe* case is "wholly void, because Judge Manton had no power to assure jurisdiction therein" (Johnson brief, p. 57). It appears, therefore, that notwithstanding broad assertions of the petitioners to the effect that the entire receivership proceedings are void, the real attack is, not upon the action itself, but upon the orders of Judge Manton made therein. The petitioner Johnson refers to various allegations of his petition and supplemental petitions in support of the charge now made in his brief that the *Brake Shoe* case is a collusive action, but it is entirely evident that the allegations of the petitions in the *Johnson* suit are directed toward quite a different matter, namely, the orders of Judge Manton in the *American Brake Shoe* suit, and the specific relief asked is that those orders be vacated and set aside, and new receivers be appointed. There is no prayer that the *Brake Shoe* action be adjudged collusive on any ground. On the contrary, the petitioners seek to perpetuate the *American Brake Shoe* action by means of the order consolidating it with their own suit (Johnson brief, p. 68) and contend that their general prayer is sufficient to entitle them to that relief (Johnson brief, p. 71). The charge of collusion seems intended, therefore, merely to create a prejudicial atmosphere, rather than to establish that the *American Brake Shoe* suit is collusive in any legal sense. Counsel submitting this brief deems it his duty, however, to point out briefly that in consenting to a receivership in the *American Brake Shoe* suit, his sole purpose was to secure the protection of a Federal court of equity to administer the affairs of a large public service corporation in the best interests of all of its creditors, with due regard to its public obligations.

It is claimed that the *American Brake Shoe* suit was "prearranged" (Johnson brief, p. 2). A consent receivership necessarily involves a degree of concert of action between the complainant and the defendant, but receiverships by consent have been judicially sanctioned for many years. More than twenty-five years ago a receivership proceeding was instituted in the United States Circuit Court for the Southern District of New York by simple contract creditors against the New York City Railway Company, a corporation providing practically all of the street surface railroad transportation in Manhattan and the Bronx and rendering what, at that time, was the most extensive local transportation service in the City of New York. The New York City Railway Company had become insolvent and counsel presenting the present brief, being at the time general attorney of the New York City Railway Company, filed in that case an answer admitting the allegations of the bill of complaint and joining in the request for the appointment of receivers, which, upon application to Circuit Judge E. Henry Lacombe, was granted. The receivership was later extended to the Metropolitan Street Railway Company and the case has since been known as the Metropolitan Railway Receivership. The procedure was thoroughly considered and fully approved by this Court (*Re Metropolitan Railway Receivership*, 208 U. S. 90, 110). The procedure of securing the appointment of equity receivers at the instance of a simple contract creditor and upon consent of the insolvent corporation, adopted in the case of the New York City Railway Company receivership, has been followed quite generally in later cases arising in the Second Circuit, and has quite recently been approved by the United States Circuit Court of Appeals for the Second Circuit in *Kingsport Press* v. *Brief English Systems*, 54 Fed. (2d) 497, 500 (1931).

We also call attention to the recent case of *Guaranty Trust Co. of N. Y.* v. *Fentress* (Oct., 1932), 61 F. (2d) 329, 332, where the Circuit Court of Appeals for the Seventh Circuit approved similar procedure in the case of equity receiverships for the Insull corporations of Chicago, individual receivers having been appointed by the District Court at the suit of a contract creditor upon the consent of the debtor. In the years 1918 and 1919, respectively, receivership proceedings were instituted by simple contract creditors against the Brooklyn Rapid Transit Company and the New York Railways Company, with the consent of the corporations, the procedure approved by this Court in the case of the Metropolitan receivership being substantially followed (see *American Brake Shoe & Foundry Co.* v. *New York Railways Co.*, 282 Fed. 523, 525; *Westinghouse Elec. & Mfg. Co.* v. *Brooklyn R. T. Co.*, 291 Fed. 836). This Court also appears to have reaffirmed its sanction of the appointment of receivers at the suit of a simple contract creditor, with the consent of the debtor, "where the defendant is a public service corporation and the unbroken performance of its services is in furtherance of the public good," in its recent decision, delivered by Mr. Justice Cardozo, in the case of *Shapiro* v. *Wilgus* (Dec., 1932), 287 U. S. 348, 356. In the instant case no contention is or can be made that the appointment of receivers by the United States District Court was an interference with the jurisdiction of the State Courts, or involved any fraudulent misrepresentations to the Court or any interested party, important elements entering into the decision in the case of *Harkin* v. *Brundage*, 276 U. S. 36.

That the parties to the *American Brake Shoe* suit agreed as to the particular forum in which the suit should be instituted is also a matter which is not open to criticism (*Blair* v. *City of Chicago*, 201 U. S. 400, 448; *Re Metro-*

*politan Railway Receivership,* 208 U. S. 90, 111). It certainly cannot be contended that the material averments of the bill of complaint in the *American Brake Shoe* case are not true, because they are substantially realleged in the bills filed by the petitioners (R. 13, 80). The contention of the petitioners that the defendant in the *American Brake Shoe* suit had a "special fund" out of which to pay the complainant (Johnson brief, p. 38; Boehm brief, p. 9), and that, therefore, the complainant did not occupy the position of an ordinary simple contract creditor, is without foundation. In support of their contention, petitioners refer to that portion of the decision of this Court in *Gilchrist* v *Interborough R. T. Co.,* 279 U. S. 159, pp. 196, 198, which quotes provisions of the contracts between the City of New York and the Interborough Company. These provisions relate merely to matters of accounting between the parties to the contracts, and neither create any special fund nor do they fix in any way the obligation of the Interborough Company to its ordinary creditors for supplies furnished.

It is further claimed by the petitioners (Johnson brief, pp. 38, 40; Boehm brief, p. 8) that the *American Brake Shoe* suit was brought to insure "friendly" receivers, and that one of its "chief objectives" was the disaffirmance of the Manhattan lease. That counsel submitting this brief earnestly hoped that the receivership would retain the aid of a management which has carried the corporation through many difficult years under the handicap of inadequate revenues is conceded. The abrogation of the Manhattan lease is entirely a matter for future judicial determination, as to which the petitioners will have an opportunity to be heard. It may be pointed out, however, that the question of collusion is not determined by the alleged motives or "objectives" of a receivership proceed-

ing. Such considerations were urged upon this Court in the case of *Dickerman* v. *Northern Trust Co.* (1900), 176 U. S. 181. In that case a mortgage had been given by the defendant to secure a large number of bonds and provided that the bonds should become payable if any execution should be sued against the property of the company, and such company should not forthwith pay the same. A bondholder brought suit before a justice of the peace upon six coupons, the defendant company consented to a judgment and to the issue of an execution, and, upon the same day, the trustees under the mortgage took possession of the property. Thereupon a bill in equity to foreclose the mortgage was filed by the trustees and a receiver was appointed upon consent. It was held that while the proceedings were instituted with the consent of the corporation for the obvious purpose of surrendering the property to the trustees and the receiver, the Court would not inquire into the motives of the parties, the debt being honestly due, and that the proceedings were not collusive in any legal sense. The Court said (at p. 190):

> "If the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits. If the debt secured by a mortgage be justly due, it is no defense to a foreclosure that the mortgagee was animated by hostility or other bad motive. * * *
>
> The company was not bound to defend if there were no defence. The forms of law were complied with. It would doubtless have been more seemly if judgment had not been entered until the return day of the summons, if the execution had not issued until the expiration of the twenty days allowed by

law, and if the trustees had not been so alert in seizing upon the non-payment of the judgment as an excuse for declaring the principal and interest of the bonds to be due. But this haste did not render the judgment or execution void. If the company had become insolvent and could no longer carry on its business, it was not only its legal obligation, but its moral duty, to surrender the mortgaged property to the mortgagees, in order that the latter might protect their interests. If the corporation saw fit to consent to a foreclosure, a minority of stockholders cannot question their right to do so."

The contention that the Interborough Company had cash for more than was necessary to pay the claim of the complainant in the *American Brake Shoe* case, and that the Interborough Company had not attempted to secure an extension of its notes, is without merit. At the time of the commencement of the suit, the maturity of more than $31,000,000 of the Seven Per Cent. Notes of the Interborough Company, due September 1, 1932, was imminent. Efforts to secure extensions of the notes would have opened the door to a multitude of actions, it having been held by the New York Courts that the individual noteholders could maintain actions and secure judgments upon their notes against the company (*General Investment Co.* v. *Interborough R. T. Co.*, 200 App. Div. 794, aff'd 235 N. Y. 133). Such a state of affairs, beyond peradventure, would have precipitated a mad scramble of noteholders and other creditors for advantage, and certainly resulted ultimately in a receivership.

**FIFTH: The order of Senior Circuit Judge Manton, designating himself to hold a District Court, is not open to review.**

The petitioners argue at length that there was no "public interest" which authorized Senior Circuit Judge Manton to hold a District Court, and that, therefore, the order of designation was wholly unauthorized and void.

Judge Woolsey held that he could not vacate the order of designation for "want of jurisdiction." Neither the petitioner Johnson nor the petitioner Boehm appealed from that part of his order which denied their motion in that respect. The Circuit Court of Appeals therefore did not have the question before it.

In any event, however, the attack of the petitioners upon the order of designation is without merit. The Senior Circuit Judge followed an established practice in the Second Circuit in designating himself to hold a District Court. That the determination of "public interest" in analogous situations is final with the designating authority is the settled doctrine of the New York Court of Appeals, the highest Court of the State comprising the Southern District (*People ex rel. S. L. & T. Co.* v. *Supreme Court*, 220 N. Y. 487). Likewise, in the case of *People* v. *Ballard*, 134 N. Y. 269, wherein a determination as to "public interests," requiring the bringing of certain actions, was held to be final with the Attorney General of the State, the Court of Appeals pointed out that, otherwise, the question of "public interests" would become an "issuable fact," and it was said (at p. 293):

> "Would not this lead to an intolerable multiplication of issues? Could those issues be defined by

pleadings? Unless so defined, could the defendants be prepared for trial?

*We think that the question as to what the public interests require is committed to the absolute discretion of the attorney-general, and that it cannot be made the subject of inquiry by the courts."*

This Court pointed out in *Ex parte United States,* 226 U. S. 420, 424, referring to the sections of the Judicial Code authorizing the designation of Circuit Judges to hold District Courts, that the statute "clearly gives to the circuit judges the rights and powers of judges of the new District Courts, and calls such powers into play when assigned according to law." Hence, the powers of a District Judge are vested in Circuit Judges *directly by the statute,* the order of designation being merely the medium whereby the exercise of such powers is brought into operation. That being so, it would seem that the jurisdiction of the designated Judge could not be affected by any irregularity with respect to the designating order, assuming that such irregularity existed.

A primary purpose of Section 22 was to conserve the traditional legislative policy of providing an opportunity for the members of appellate Federal courts to sit at *nisi prius.* This general purpose, as well as that of checking "the tendencies to give them (the lower courts) a local character," was expressed in the course of the debate preceding its enactment on behalf of the American Bar Association, a committee of which had drawn up the bill originally submitted in 1899 (46 *Congressional Record,* Part 2, p. 1542).

It was further stated by Mr. Brantley (46 *C. R.,* Part 3, p. 2147) that "the founders of this Government were wise in my judgment when they so framed our judicial

system that the great judges of the Supreme Court and that the great appellate judges of the Country would not be segregated and set apart and removed from all contact with the people. * * *" And he referred (p. 2148) to the statements of Senators Evarts and Morgan in the debate of 1890 to the same effect, in which the opinions of the members of the Supreme Court on the advantages of *nisi prius* work by the members of the higher courts were quoted.

At page 2155 Mr. Moon, of Pennsylvania, in charge of the bill, read a letter by Judges Taft, Lurton and Day stating that "we suggest the wisdom of a provision that shall enable the Circuit Court of Appeals * * * to designate and authorize one of its members to hold a district court in an emergency. * * * We feel sure that emergencies may arise rendering it most desirable that one of the Circuit Judges should be enabled to hold a district court in exceptional cases."

In the debate in Congress (46 *C. R.*, Part 1, p. 302), Mr. Parker also said:

> "From the beginning the courts of the United States have been on the English plan, where if it be an important case, the judge of the highest court went down in order to try the case before the people in the beginning";

and at page 333:

> "We want to preserve it and not to destroy it."

And on page 302, Mr. Moon approved a statement of Mr. Bartlett, of Georgia, that under Section 22 "a Circuit Judge can be required to go and preside in important cases."

Other references to the designation of Circuit Judges to try important cases were made (as at p. 303, 46 *C. R.*), where it was pointed out that "great equity cases are almost always heard before the circuit judges rather than by the district judge" and that it should be left to the judges of the highest Court "to determine for themselves * * * whether the cases are of sufficient importance."

The historic background and the legislative history of the statute, as well as its unequivocal language, forbid the possibility of a legislative intent that its broad remedial purposes should be impaired by local nullifying rules of practice. In *United States* v. *Gill*, 292 Fed. 136 (C. C. A. 4th, 1923), acting under Section 22, it was held:

> "The 'public interest' is involved in the dispatch of all the business of the courts. *These sections of the statute were intended to have a liberal and elastic rather than a strict and rigid construction, to facilitate the business of the courts.* The public interest is involved in all the conditions mentioned in sections 13, 14 and 20 (Secs. 17, 18 and 24, U. S. C.). Therefore we construe Section 18 of the Judicial Code (Sec. 22, U. S. C.) to authorize the Chief Justice, or circuit justice, or the senior circuit judge, to designate a circuit judge to hold the district court when any of the conditions mentioned in Sections 13, 14 and 20 *or any other conditions* arise which in his judgment so involve the public interest as to require the designation of another judge to hold any District Court." (Italics ours.)

A long-continued practical construction has been given to Section 22. Since the adoption of the Judicial Code in

the year 1911, Senior Circuit Judges of the Second Circuit, on various occasions, have designated themselves to hold a District Court in the Southern District of New York. Beginning with the year 1912, Senior Circuit Judge E. Henry Lacombe made several such designations, and like designations have been made by his successors, Senior Circuit Judges Henry G. Ward, Henry Wade Rogers, Charles M. Hough and Martin T. Manton (R. 553-554). In certain cases these designations have been general and in other cases they have provided for the hearing of specific cases (R. 655, 661). The same practice has been followed in other judicial circuits (R. 555-556, 662). Owing to congestion in the District Court for the Southern District of New York in recent years, many non-resident District Judges have also been designated to hold a District Court in that district, and the creation of additional judgships is now under consideration (R. 556, 558). Under date of March 20, 1930, Senior Circuit Judge Manton designated himself "to hold at any time a session or sessions of the District Court for the Southern District of New York for the trial of causes and the hearing and disposition of motions, petitions for naturalization, and such ex-parte and other business as may come before him" (R. 661). Judge Lacombe, who became Senior Circuit Judge of the Second Circuit at the time of the enactment of Section 22, twice designated himself to conduct a particular cause (R. 655, 657) (see *Penn. Steel Co.* v. *N. Y. City Ry.*, 221 Fed. 440 [S. D. N. Y., 1915]), and each of the Senior Circuit Judges of that circuit has since then designated himself.

The practice of Senior Circuit Judges to designate themselves to hold District Courts, and in their designation orders to prescribe the trial of particular cases, was fully established at the time Section 22 was re-enacted in 1922.

The designation upheld in *United States* v. *Gill, supra,* was to try a particular case.

**The Duty to Perform the Judicial Functions Prescribed in the Order of Designation Was Made Mandatory by Section 23.**

Section 23 provides: "It shall be the duty of the district or circuit judge who is designated and appointed under either of sections 17 to 22 of this title, to discharge *all the judicial duties for which he is so appointed,* and all the acts and proceedings in the courts held by him, or by or before him shall have the same effect and validity as if done by or before the District Judge of the said district."

As said by Mr. Moon, Chairman of the Judiciary Committee, 46 *C. R.,* p. 304, in answer to the suggestion that the "designation is rather a disagreeable function to perform." The designated judge "is compelled by the next section (23 U. S. C.) to discharge those duties."

A power conferred concurrently upon the Chief Justice, the Circuit Justices and the Senior Circuit Judges, to find the existence of a public interest cannot be subject to review. The power is one of supersession and should possess, above all, finality, for if a finding of the fact of public interest can be made subject to review, or if disabling rules of the lower court are permitted to impair or render uncertain the operation of the power, not only would delay result, but unnecessary occasions for conflict be induced by attempts to limit or prevent the exercise of the designated powers.

An attack upon the finding of public interest in the present case seems peculiarly unwarranted, for it is recognized by the petitioner Boehm (Brief, p. 33) that a "great public interest" was involved in this receivership.

Instances of designation under Section 22 in receivership cases have been very frequent in this district and the exceptional character of the instant receivership, in its relation to the public interest, would seem entirely evident. No grounds for the finding of public interest are stated in the order and the finality of the finding is not open to question; but, in view of the reliance placed by petitioners upon the contention that a designation made to insure the appointment of individual receivers in a receivership of this character would be wholly devoid of public interest, it may be noted that there are over $300,000,000 par value of the securities of the Interborough and Manhattan Companies in the hands of the public and listed upon the local exchange. These securities are unquestionably widely distributed among the stockholders, depositors and officers of local financial institutions, which, as receivers, would be subject to the embarrassment of the "innumerable possibilities of conflict" between conflicting interests, to which the Boehm brief (p. 36) refers.

That the public interest has been served is evidenced by the fact that notwithstanding such peculiar possibilities of conflict, there has been no claim from any source that the conduct of the receivers has been otherwise than impartial and efficient. Nor can there be any doubt as to the imminent necessity of the receivership as the subject of an order of designation directed to meet that emergency.

Rules 1-a and 11-a, if given the force for which petitioners contend, are jurisdictional in effect, destroy judicial powers and inhibit the exercise of duties conferred and made mandatory by express statutory provisions. No rule of court can restrict jurisdiction (*Washington-Southern Co.* v. *Baltimore Co., supra*).

**The Order of Division of Business.**

The power and duty of Judge Manton to perform the designated function of entertaining the application of the American Brake Shoe Company reposed upon his statutory designation of August 25th "to hear and determine all applications and proceedings in the matter entitled American Brake Shoe and Foundry Company vs. Interborough R. T. Co." (R. 177). The grant of power under Section 22 was plenary, and Section 23 imposed an obligation "to discharge all the judicial duties for which he was so appointed."

Section 27, U. S. C., provides that:

> "In districts having more than one district judge the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district."

The provision requiring the Senior Circuit Judge to divide the business in case of disagreement is mandatory in form and the finding of the Senior Circuit Judge as to a failure of agreement is final (*Case* v. *United States,* 14 Fed. [2d] 510, 512).

The authorization to divide work by agreement is permissive and in that respect Section 27 is a mere general provision for the convenient distribution of business.

Section 22 is a specific grant of power to exercise designated functions. It deals specially with a particular subject, and, in accordance with recognized principles of

statutory construction, it, and not the general and permissive provisions of Section 27, controls the jurisdiction of a judge designated to perform specific duties.

Section 27 provides for the mere convenient division of business and is not concerned by whom, among the District Judges, it may be performed. But Sections 22 and 23 specifically provide for the selection of a judge of a higher court to perform work of the District Court which the designating justice or judge may deem, in the public interest, should be done by such designee and by no other judge.

Rule 11-a seeks to limit (in the instant case to destroy) the right to perform the designated work.

The special purpose and requirement expressed by Sections 22 and 23 must govern. Otherwise a specific legislative intent, remedial in character, would be nullified by a general and less specific provision.

> *Rogers* v. *United States*, 185 U. S. 83, 87, 89.
> *United States* v. *Mammoth Oil Co.*, 14 F. (2d) 705, 715.
> *Simon* v. *Simon*, 26 F. (2d) 530, 532.

Judge Manton being by Sections 22 and 23 specifically vested during his term of service under the order of designation with all the rights, duties and powers of a District Judge, became a District Judge to the extent of such coordinate and equal powers of his associate appointed District Judges as might be necessary to the discharge of his statutory duties. If and to the extent that the discharge of those duties is made dependent upon rules of division of business, which can possess validity only by concurrent and unanimous agreement by the Judges affected thereby, his right and duty in the performance of the functions of a

District Judge must therefore extend to the granting or withholding of assent to such rules. No rule of the appointed Judges can confine to themselves alone the discharge of the business of the Court, for that business must at all times be the subject of the superior and superseding disposition effected in the public interest by the power of designation reserved to Judges of the higher Courts by Section 22 and other statutory provisions.

In the presence of rules inhibiting the performance of designated duties and functions, a disagreement as to the division of business among the Judges necessarily exists and must, pursuant to the requirement of Section 27, be found to exist by the Senior Circuit Judge of the circuit in which the district lies. The duty is then imposed upon the Senior Circuit Judge to make, in the interest of orderly procedure, all orders for the division of business necessary to resolve the situation thus created.

A Circuit Judge designated under Section 22 does not act under the designation as a Circuit Judge. His powers within the purview of the judicial functions essential to the performance of his designated duties are no greater or less than those of his Associate District Judges. But he cannot possess *all* the powers, rights and duties of a District Judge, as is specifically provided under Section 22, and be denied the essential power *not* to agree to a division of business which excludes him from the discharge of his designated duties imposed by the same section. The power to agree upon a division of business is one of the powers of a District Judge, for it is specifically conferred by Section 27, and the power of disagreement is necessarily correlative thereto.

Judge Manton accordingly felt constrained to effect a distribution of business to the extent that the existing

disagreement with the other District Judges affected the performance of his designated duties (R. 178).

His order of division of business effected, not a grant of power, for that arises out of the statute authorizing the designation, but an explicit and orderly definition of the scope and intent of the power expressed in the order of designation and was made in accordance with the procedure prescribed by Section 27.

The argument of the petitioner that the order of designation constituted Judge Manton a District Judge so as to be governed by a distribution of business effected by his fellow Judges, but that he was stripped of all rights and powers of a District Judge essential to the performance of the judicial duties specified in the same order of designation by reason of "calendar" rules, which can derive no validity other than by agreement of the District Judges affected thereby, is wholly untenable. Yet, in the absence of the order of division of business prescribed by Section 27 under conditions of disagreement, it might possibly have been contended that the order of designation was intended to be merely conditional and subordinate to Rules 1-a and 11-a. The definite declaration of the order of division serves therefore the essential purpose of making entirely clear that the designee of the Senior Circuit Judge did not come into the District Court in subordination to rules nullifying his designated powers, but with the clear intent and power of performing his full statutory duty.

## CONCLUSION.

**The decision and decree of the Circuit Court of Appeals, reversing the decrees of the District Court, should be affirmed.**

Respectfully submitted,

JAMES L. QUACKENBUSH,
Counsel for Respondent,
Interborough Rapid Transit Company.

LOUIS S. CARPENTER,
J. OSGOOD NICHOLS,
of Counsel.

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APR 17

CHARLES ELMOR

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. 711 and 721.

BENJAMIN F. JOHNSON,

*Petitioner,*

*against*

MANHATTAN RAILWAY COMPANY *et al.*,

*Respondents.*

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,

*Respondent,*

*against*

INTERBOROUGH RAPID TRANSIT COMPANY,

*Respondent.*

IN THE MATTER

*of the*

INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF OF RESPONDENT WILLIAM ROBERTS, AS RECEIVER FOR MANHATTAN RAILWAY COMPANY

CHARLES E. HUGHES, JR.,
ALLEN S. HUBBARD,
*Counsel for Respondent William Roberts, Receiver for Manhattan Railway Company.*

April, 1933.

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Re Metropolitan Railway Receivership, 208 U. S. 90 3

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. 711 and 721.

BENJAMIN F. JOHNSON,
*Petitioner,*
*against*
MANHATTAN RAILWAY COMPANY *et al.*,
*Respondents.*

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
*Respondent,*
*against*
INTERBOROUGH RAPID TRANSIT COMPANY,
*Respondent.*

IN THE MATTER
*of the*
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF OF RESPONDENT WILLIAM ROBERTS, AS RECEIVER FOR MANHATTAN RAILWAY COMPANY

### *Opinions Below*

The opinion of the District Court (R. 694-721) is reported in 1 Fed. Supp. 809.

The opinion of the Circuit Court of Appeals (R. 1024-1035) is reported in 61 F. (2d) 934.

### *Jurisdiction*

The orders of the Circuit Court of Appeals were entered on December 14, 1932, and the final order of that Court for mandate was entered on December 29, 1932 (R. 1036, 1047). The petitions of Johnson and the intervenor Boehm for certiorari to review the orders were filed respectively on February 17, 1933 and February 23, 1933, and were granted March 20, 1933 (R. 1049). The jurisdiction of this Court rests on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

### *Statement*

For a full statement of the facts we refer to the briefs of the respondent The American Brake Shoe and Foundry Company and of the respondents Victor J. Dowling and Thomas E. Murray, Jr., as Receivers for Interborough Rapid Transit Company. The following is a sufficient statement of those facts which relate particularly to the position of William Roberts, as Receiver for the Manhattan Railway Company:

On August 26, 1932, The American Brake Shoe and Foundry Company filed a bill of complaint in the United States District Court for the Southern District of New York against Interborough Rapid Transit Company, alleging, among other things, the inability of the Interborough to pay its debts and asking the appointment of re-

ceivers. The Interborough filed its answer on the same day admitting the allegations of the bill. On the same day Hon. Martin T. Manton, Senior Circuit Judge, having theretofore designated himself to hold a term of the District Court and particularly to hear and determine all applications and proceedings in that cause, made and filed an order appointing Victor J. Dowling and Thomas E. Murray, Jr., Receivers for the Interborough. The order appointing the Receivers provided " * * * that any applications or petitions for orders or instructions or otherwise in this cause shall be made to the undersigned in chambers or otherwise, the undersigned hereby reserving full right and jurisdiction over this cause and any and all proceedings therein" (R. 183-184).

Substantially all of the property owned by Manhattan Railway Company was under lease to the Interborough for a term of 999 years, under the provisions of which the Interborough received the earnings from the leased property, assuming, however, obligations, among other things, to pay all taxes levied against the Manhattan property, interest on its bonds and certain dividends on its stock. After the appointment of the Receivers for the Interborough, the Manhattan considered that its interests and those of its security holders required the extension of the protection of a court of equity over its property. The property under lease was then in the possession of the Interborough Receivers. Acting under the authority of *Re Metropolitan Railway Receivership,* 208 U. S. 90, the Manhattan, by its own counsel, filed its petition for intervention in the American Brake Shoe case and for the extension of the receivership to its property (R. 248-255). Judge Manton appointed William

Roberts Receiver for the Manhattan on September 6, 1932 (R. 196).

It was held by the District Court that because the original application by the American Brake Shoe and Foundry Company for the appointment of receivers for the Interborough was made to Judge Manton, as Senior Circuit Judge designated to hold a District Court, instead of to the District Judge holding the motion part, the original appointment of Receivers for the Interborough was wholly void and that all proceedings thereafter taken in the American Brake Shoe case, including the appointment of William Roberts as Receiver for the Manhattan, were likewise wholly void.

Apart from their discussion of the above question, which we believe to be the only one properly before this Court, petitioners in their briefs make numerous statements with respect to alleged improprieties in the appointment of Mr. Roberts as Receiver for the Manhattan and his alleged unfitness for that office. These statements, where they have any basis at all in the record, rest solely upon allegations in the bills of complaint. The allegations in question were explicitly and circumstantially denied in two affidavits of Mr. Roberts which were before the District Court (R. 665-679). It would not, we submit, be proper to make such allegations, so denied, the basis of summary relief in advance of trial. The following are the statements referred to and references to the denials in Mr. Roberts' affidavits:

The brief of the petitioner Johnson (pp. 38, 63) refers to allegations that the receiverships of both the Interborough and Manhattan were brought about pursuant to an understanding or conspiracy to which Mr. Rob-

erts was a party. The original affidavit of Mr. Roberts stated categorically (R. 674) that he "had no knowledge or intimation that a receivership of the Interborough Company was contemplated until after the appointment of the receivers therefor on August 26, 1932", and this is circumstantially amplified in his supplemental affidavit (R. 675-676).

The brief of the petitioner Boehm states (p. 11) that the appointment of Mr. Roberts as Manhattan Receiver was sponsored by Interborough-Brooklyn-Manhattan Transit interests and (p. 52) that he was in close accord with the management of the Interborough. Mr. Roberts' affidavit (R. 666-669) denied categorically the imputation that he is connected with or dominated by Brooklyn-Manhattan Transit Company-Interborough interests, sets forth in detail the circumstances of his connection with the Manhattan and denies, so far as his knowledge extends, any sponsoring of his appointment as receiver by anyone.

This affidavit also denies (R. 671) the allegations, frequently referred to in the brief, that the Manhattan has been under the domination and control of Interborough and explains completely (R. 669-671) the allegations of interlocking directors. Under the Plan of Readjustment of 1922, payment of dividends upon the assenting stock of Manhattan was made dependent on earnings, and it was provided that Manhattan should have the right to nominate three of Interborough's eighteen directors. These three directors, who were put on the Interborough Board by Manhattan to protect the interests of Manhattan stockholders, are those who the brief of petitioner Boehm (p. 3) intimates dominate Manhat-

tan in the interests of Interborough. There was only one interlocking director apart from this arrangement, Mr. Charles L. Hayden.

The record shows consistent effort on the part of the Manhattan Receiver to prevent any action that might lead to the result, frequently referred to in the brief of this petitioner, that the Interborough might get rid of the Manhattan lease through defaulting on rental obligations and permitting the first mortgage upon the properties of the Manhattan to be foreclosed, with the consequent wiping out of the interests of its second mortgage bondholders and stockholders. The brief states (p. 12) that the Interborough Receivers defaulted on the payment of interest on the Manhattan's first mortgage on October 1, 1932, and that this would have caused foreclosure had not Judge Manton "on the application of the Mortgage Trustee, and on the recommendation of Basil O'Connor, as Special Master, on the last day of the grace period directed the receivers to make payment". As a matter of fact, it appears in the printed record before this Court that it was Mr. Roberts, as Receiver, who filed the petition on September 28, 1932, demanding payment of this interest (R. 366-372), which, with the petition of the Interborough Receivers for instructions in the premises (R. 329-343), formed the basis for Judge Manton's opinion (R. 539-544) and order referring the question to the Special Master. The brief also states, outside of the printed record before this Court, but in accordance with the actual record in the American Brake Shoe case, that on April 1, 1933, the first mortgage interest again fell due and the Interborough Receivers have again suffered a default placing the Manhattan bondholders

and stockholders again in the same jeopardy. Explaining this, we similarly state that Mr. Roberts, as Receiver of the Manhattan, filed on March 31st a petition demanding the payment of this interest as well as all rentals under the Manhattan lease, thereby raising for a prompt adjudication the question whether the Manhattan lease is subject to disaffirmance at all by the Interborough Receivers. There is no basis at all for any intimation that the Manhattan Receiver has not been energetic in his efforts to save the Manhattan properties from foreclosure.

The statements in the brief of petitioner Boehm (p. 38) with respect to Mr. Roberts' alleged neglect of duty as president, director and counsel of the Manhattan, and the alleged resulting cause of action against him and his co-directors are dealt with in his affidavits (R. 671-674, 678-679). The proceedings in the American Brake Shoe case, subsequent to the preparation of the printed transcript of record before this Court, show that these allegations, and the other allegations above referred to, have been made the basis of an application to Judge Manton on behalf of the Manhattan Railway Company (the management of which was changed at the last annual meeting of stockholders) by its present counsel (who is the same as the chief counsel for the petitioner Johnson herein) for the removal of Mr. Roberts as Receiver and the appointment in his place of Mr. Nathan L. Amster, its new president, who (R. 568) had theretofore been a director and closely allied with the Company. This application has been referred by Judge Manton to the Special Master and hearings thereon are now proceeding before him. It appears from the affidavit of J. Osgood Nichols

in the record before this Court that the same counsel, then appearing for a Manhattan common stockholders' protective committee of which Mr. Amster was a member, had urged upon Judge Manton at the time that Mr. Roberts was appointed on September 6, 1932, the appointment of Mr. Amster as an additional receiver (R. 566-571).

### *Argument*

It is not our purpose to duplicate or parallel the argument in the briefs of the American Brake Shoe and Foundry Company and of the Interborough Receivers, to which we refer for a detailed presentation of the questions involved and a discussion of the applicable authorities.

It was conceded by Judge Woolsey that the District Court had jurisdiction of the cause of American Brake Shoe and Foundry Company against Interborough Rapid Transit Company (R. 712). It was likewise conceded that Judge Manton was duly designated under Section 18 of the Judicial Code (U. S. Code, Title 28, Sec. 22) to hold a District Court for the Southern District of New York (R. 698).

Under Section 19 of the Judicial Code (U. S. Code, Title 28, Sec. 23) he was empowered as a judge so designated to "discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed" and all his acts and proceedings had "the same effect and validity as if done by or before the district judge of the said district." Unless validly limited, those powers plainly included jurisdiction to appoint receivers.

The only limitations asserted are contained in new Rules 1-a and 11-a adopted by the eight district judges. Authority for the adoption of those rules is to be found, if at all, in the permission accorded District Courts by Section 731 of Title 28 of the United States Code to make rules regulating practice provided, among other things, they are "not inconsistent with any law of the United States", or the permission granted to the district judges by Section 23 of the Judicial Code (U. S. Code, Title 28, Sec. 27) to agree upon the division between them of the business of the Court.

The questions presented are, first, whether a Circuit Judge duly designated to hold a District Court under the statutory authority above cited was affected at all by such rules; and, second, if he was, whether his failure to comply with them deprived him, as held by the District Court, of all "judicial competence" and made his acts not those of a judge either *de jure* or *de facto* but of a usurping individual and so *coram non judice* and void. Both questions must be answered in the affirmative before the decision of the Circuit Court of Appeals may be reversed.

At the time when the Manhattan Railway Company made its application for intervention, the first question had already been determined by Judge Manton. His appointment of receivers for the Interborough necessarily involved a decision that he was not bound by Rules 1-a and 11-a adopted by the district judges. The decision of Judge Woolsey that he was so bound proceeds upon a construction of Sections 18 and 19 of the Judicial Code that they merely authorize the designated Circuit Judge to enter the district court, but that what he may do in that court is wholly dependent upon the wish of the dis-

trict judges who may wholly exclude him from acting in the very matter or matters in which the public interest was deemed to require that he do act. We submit that the manifest policy of this legislation does not permit such an interpretation.

We can add nothing to the language of the Circuit Court of Appeals (R. 1029-1030, 1032-1033) concluding that the recital of public interest by the Senior Circuit Judge may not be made the subject of independent inquiry. Nor is the distinction attempted by petitioners between a general designation by him of a Circuit Judge to sit in the District Court and a designation to hear a particular matter an admissible one. It is readily conceivable that under the statute the Chief Justice of the United States or a Circuit Justice, or a Senior Circuit Judge, might find a more compelling reason in the public interest to make a designation covering a particular case than to make a general designation. We submit that Judge Manton's power as a Circuit Judge duly designated to hold a District Court was not impaired by Rules 1-a and 11-a of the District Judges and that, in this view, his so-called division of business order is of no importance.

If, however, it should be held, in agreement with Judge Woolsey, that when a designated Circuit Judge proceeds to sit in the District Court "he must obey its rules", of the sort here involved, the question of the effect of non-compliance remains.

Unless Rules 1-a and 11-a are to be given effect as the equivalent of statutes prescribing limitations upon judicial power, parties like the Manhattan Railway Company which were affected by the appointment of receivers

for the Interborough and desired to intervene for the protection of their own interests, were not only entitled but required to recognize the validity of the existing proceeding and had no standing to raise any question of mere irregularity, if one existed, in the proceeding before the judge to whom under the original order and under Rule 4 of the Equity Rules of the District Court of the Southern District of New York all subsequent applications must be made.

There is, it is submitted, a wide difference between a rule of practice and a jurisdictional statute. The authority to pass rules of practice cannot be deemed to give authority to prescribe the jurisdiction of judges. When it is said that a valid rule of practice has all the validity of a statute, it is meant that such a rule of practice has the validity and effect of a statute relating to practice. The disregard or violation of a statute relating to practice does not mean loss of jurisdiction. So, also, the disregard or violation of a rule of practice enacted pursuant to legislative authority cannot mean loss of jurisdiction.

Even if Judge Manton, as a duly designated Judge holding a District Court, was subject to Rules 1-a and 11-a, the effect of a disregard of these rules by him cannot be more serious than a corresponding disregard of such rules by a District Judge. If a District Judge, not sitting in the motion part, should appoint receivers in violation of Rule 11-a, the appointment would not be void but would be a mere irregularity of practice. If this were not so, the business of the court could hardly go on. No one would be entitled to rely upon any order in any receivership unless he first ascertained that the receiver had been appointed by a Judge sitting in the motion part of the court.

It is submitted that the District Court was in error in ascribing to the alleged violations of Rules 1-a and 11-a by Judge Manton a loss of judicial competence to make valid and effective orders, and that its orders, which proceeded upon this theory, were properly reversed by the Circuit Court of Appeals.

Respectfully submitted,

CHARLES E. HUGHES, JR.,
ALLEN S. HUBBARD,
*Counsel for Respondent William Roberts, Receiver for Manhattan Railway Company.*

April, 1933.

# RESPONDENT'S BRIEF

FILE COPY

# Supreme Court of the United States

October Term, 1932.
Nos. 711 and 731.

---

BENJAMIN F. JOHNSON, *Petitioner*,

*against*

MANHATTAN RAILWAY COMPANY, *et al.*

---

LILLIAN BOEHM, *Petitioner*,

*against*

MANHATTAN RAILWAY COMPANY, *et al.*

---

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

---

## BRIEF OF RESPONDENTS

**Van S. Merle-Smith and Others, as the Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Bonds.**

---

PAXTON BLAIR,
*Counsel for Van S. Merle-Smith and others, as the Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Bonds.*

BOYKIN C. WRIGHT,
CLIFTON MURPHY,
*Of Counsel.*

IN THE

# Supreme Court of the United States

**October Term, 1932.**

**Nos. 711 and 721.**

BENJAMIN F. JOHNSON,
*Petitioner,*

*against*

MANHATTAN RAILWAY COMPANY, *et al.*,

---

LILLIAN BOEHM,
*Petitioner,*

*against*

MANHATTAN RAILWAY COMPANY, *et al.*,

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

---

## BRIEF OF RESPONDENTS

### Van S. Merle-Smith and Others, as the Protective Committee for Manhattan Railway Company Consolidated Mortgage 4% Bonds.

This brief is filed on behalf of Van S. Merle-Smith and others as a Protective Committee for the holders of Manhattan Railway Company Consolidated Mortgage 4% Bonds. The Committee duly intervened in the District Court, pursuant to an order obtained for that pur-

pose (R., 201). The principal facts have been adequately set forth in the briefs filed by the other Respondents.

In addition to what seem to us to be controlling doctrines of law and of practice (discussed at length in the briefs of certain of the other Respondents) for affirming the decision of the Circuit Court of Appeals, we respectfully urge upon this Court that the confused and chaotic condition which has existed in the Interborough-Manhattan Receivership, as a result of the Johnson suit, makes it of the highest importance in behalf of the vast body of interested and intervening security holders, that this Court should not upset the existing receiverships.

As we see it, the Court is here presented with a situation where the administration of property belonging to creditors has been carried on for almost eight months under judicial supervision and authority, and where the only challenge made concerns not the existence of that authority but merely a difference of opinion as to the wisdom with which that authority has been exercised. Here the senior Circuit Judge, duly designated and sitting as a District Judge, has appointed Receivers of the properties and has assumed their administration. Bondholders and other creditors have intervened in the only forum open to them; various questions vitally affecting these creditors have been presented and settled, and others are now before Judge MANTON and call for prompt disposition if irreparable damage to creditors is not to ensue.

It is earnestly urged that the preservation and the orderly determination and disposition of the rights of these creditors are superior to any conflict or disagreement

between the various judges charged with the administration of equity matters in the Southern District of New York. We further contend that if the authority and jurisdiction of the Judge administering the receiverships are to be challenged at all, the challenge should, in the interest of orderly procedure, have been by a direct attack, and that this Court should not permit a collateral attack. The damaging and disastrous consequences of such an attack are already apparent in the unfortunate confusion and chaos now manifest in these proceedings. The Court should therefore take no step which would perpetuate rather than relieve that confusion and chaos.

This Respondent wishes to call to the especial attention of this Court the brief filed by the Corporation Counsel on behalf of the City of New York as *amicus curiae*, and to ask that this Court give attentive hearing to the important considerations there presented. In all receiverships of traction properties, and pre-eminently in this particular receivership, the interests of the City and of the public represented by the City are necessarily a matter of the greatest concern to the courts. These considerations of public interest have been fully presented in the brief of the Corporation Counsel and we feel that it would be both unnecessary and inappropriate for us to add anything on this score or to set forth at length our own interpretation of these considerations.

However, from the point of view of the holders of the Consolidated Mortgage bonds of the Manhattan Railway Company and in their behalf, we desire respectfully to point out to the Court that the vested property rights of these bondholders, as well as the rights of the City of New York referred to in the brief of the Corporation

Counsel, will be seriously injured or at least endangered if these receiverships be used as instrumentalities to accomplish the disaffirmance of the Manhattan lease and thus cause the disruption of the entire system of jointly-operated subway and elevated lines. Accordingly, while we earnestly urge upon this Court that the existing receiverships be continued and the Johnson bill be dismissed, we respectfully ask, not only for the protection of the rights and interest of the City referred to by the Corporation Counsel, but also for the protection of the property rights of the Manhattan Bondholders, that this Court should direct, or otherwise impose as a condition of affirming the order under review, that in the conduct of these Federal Receiverships the Interborough Receivers should not be permitted to disaffirm the Manhattan lease or cast adrift the elevated lines, and thus make impossible the performance of the franchise obligations of the Interborough Company arising from its various contracts with the City of New York.

Dated, New York, N. Y., April 15, 1933.

Respectfully submitted,

PAXTON BLAIR,
*Counsel for Respondents Van Santvoord Merle-Smith and others, as the Protective Committee for Manhattan Railway Company Consolidated Mortgage Four Per Cent. Gold Bonds.*

BOYKIN C. WRIGHT,
CLIFTON MURPHY,
*of Counsel.*

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

Nos. 711 and 721

BENJAMIN F. JOHNSON, *Petitioner*

*v.*

MANHATTAN RAILWAY COMPANY, *et al.*

LILLIAN BOEHM, *Petitioner*

*v.*

MANHATTAN RAILWAY COMPANY, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

## Brief of Respondent Central Hanover Bank and Trust Company, as Trustee Under Consolidated Mortgage of Manhattan Railway Company

EDWARD CORNELL

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APPEAL PRINTING CO., 22 THAMES ST., NEW YORK CITY

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I. The Circuit Court of Appeals properly reversed the so-called Consolidation Order; and inasmuch as, without the consolidation attempted by such order, the *Johnson* suit was manifestly a collateral attack upon *de facto* action in the *Brake Shoe* suit, the proper reversal of the Consolidation Order fully justified the decision of the Circuit Court of Appeals ..... 4

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

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*v.*

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LILLIAN BOEHM,

*Petitioner,*

*v.*

MANHATTAN RAILWAY COMPANY, *et al.*

---

**On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

---

## Brief of Respondent Central Hanover Bank and Trust Company, as Trustee Under Consolidated Mortgage of Manhattan Railway Company.

## Statement.

The general facts adequately appear in the briefs submitted by the other respondents. However, certain facts relating particularly to the position of the respondent Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Company, should be stated herein in order to show its interest that, by affirmance of the decision below, finality be imposed upon the attacks which have been made on the jurisdiction in the Interborough and Manhattan receivership cases.

In the brief of the petitioner Johnson, it is several times stated (pp. 2, 13, 56, 59, 69) that all of the parties in the *Brake Shoe* suit are parties defendant in the *Johnson* suit. Such is not the fact. This respondent was a party to the *Brake Shoe* suit by its intervention allowed therein on September 19, 1932; but it was never a party in the *Johnson* suit begun on September 21, 1933—except for the asserted effect of the erroneous order consolidating the *Brake Shoe* suit with the *Johnson* suit.

The District Court made three orders which are mentioned in the briefs of the other parties. Two of these orders were made in the *Johnson* suit to which this Trustee was not a party. The third order, called the "Consolidation Order," was made not only in the *Johnson* suit but also in the *Brake Shoe* suit to which this Trustee was a party. From the third order this respondent appealed to the Circuit Court of Appeals. It did not appeal from the other two orders, made in the suit to which it was not a party.

By its brief in this Court the petitioner Johnson asserts (pp. 68-71) that the Circuit Court of Appeals was in error in setting aside the Consolidation Order. It is very doubt-

ful whether this question is before the Court inasmuch as Johnson did not assign error in this respect. If such question is before the Court, this Trustee is a respondent in respect thereof.

This respondent is the Trustee under the Consolidated Mortgage (which is the first mortgage) of Manhattan Railway Company, dated February 26, 1890, securing $40,683,000 in principal amount of bonds. There is no dispute that default exists under said mortgage, in that taxes due in November, 1932, amounting to upwards of $780,600, have not been paid (the interest instalment of April 1, 1933, amounting to $813,660, being also in default); and that said default is a presently actionable event of default under said mortgage.

In the *Brake Shoe* suit this Trustee, after its intervention and on September 28, 1932, filed its bill of complaint by which it asked for the impounding of the income from the mortgaged property, and it asserts that by the filing of said bill the said income was impounded as of said filing date. On October 3, 1932, it filed in said suit its petition asking that the income from the mortgaged property be segregated and held in a separate account, so that Manhattan income should not be used for general Interborough purposes. Many proceedings have been had in the *Brake Shoe* suit affecting this Trustee and the bondholders secured by its mortgage.

This respondent, therefore, has an interest that the confusion shall be avoided which would result from sustaining the collateral attack made herein upon the jurisdiction.

## ARGUMENT.

### I.

**The Circuit Court of Appeals properly reversed the so-called Consolidation Order; and inasmuch as, without the consolidation attempted by such order, the *Johnson* suit was manifestly a collateral attack upon *de facto* action in the *Brake Shoe* suit, the proper reversal of the Consolidation Order fully justified the decision of the Circuit Court of Appeals.**

By the Consolidation Order the *Johnson* suit and the *Brake Shoe* suit purported to be consolidated "into one cause." In Judge WOOLSEY's opinion it is stated that the purpose of such consolidation was to avoid the "residuum of doubt" which would exist so long as the *Johnson* suit and the *Brake Shoe* suit should remain separate causes.

We believe that more than a doubt existed whether the Court in the *Johnson* suit could set aside the orders made in the *Brake Shoe* suit. In fact it is perfectly certain that, whatever may be the merits of the main controversy, Johnson's suit was a collateral attack upon action which this respondent and the other intervenors in the *Brake Shoe* suit were entitled to treat as the action of a *de facto* judge.

We believe that the merits of the main controversy as to whether Judge MANTON acted *de jure* have never been involved in this case.

This respondent had nothing to do with the institution of the Interborough receivership. When the Interborough receivers were appointed they took possession not only of the Interborough properties but also of the Man-

hattan leased properties which constituted the security for its mortgage. Upon application of Manhattan, the receivership was extended to the Manhattan properties, although such properties have remained in the possession of the Interborough receivers. The appointment of the Interborough receivers disclosed to this respondent that Interborough had permitted large defaults to occur and continue in respect of taxes upon the Manhattan leased properties, which defaults constituted actionable events of default under this respondent's mortgage. To protect its interests, it intervened in the Interborough suit. Shortly after its intervention the Interborough Receivers defaulted in the payment of the interest due October 1, 1932, from Interborough, under the Manhattan lease, upon the Consolidated Mortgage Bonds; and in connection with such defaults and other matters, it has taken such proceedings in the *Brake Shoe* suit as have appeared advisable for the protection of its bondholders.

Johnson and all other possible objectors were given full opportunity to be heard on September 22, 1932, which was the return day of the order to show cause why the Interborough and Manhattan receiverships should not be made permanent. He did not appear. Judge MANTON, under two designations, was a District Judge, and, having first appointed temporary receivers, later appointed them, without objection, as permanent receivers. Any argument that his action was not *de facto* is baseless; and it is equally clear that for Johnson to attack the *Brake Shoe* proceedings by an entirely different suit, with different parties, was a collateral attack.

It is also certain that the difficulty could not be cured, as the District Court attempted, by making the two causes "into one cause" or, as it has been otherwise

expressed, by throwing the two causes into "hotchpot". After consolidation, the two causes still remain separate and distinct.

Dismissal of the Johnson bill, as a collateral attack on *de facto* action, could only have been avoided by such an unauthorized consolidation as the District Court had in mind. The decision of the Circuit Court of Appeals in reversing the Consolidation Order was clearly correct, not only because the situation was an improper one for any consolidation, but also because the expressed reason for the consolidation was to give to Johnson a standing in the *Brake Shoe* suit which could not be given to him in any such way.

## II.

**The decision of the Circuit Court of Appeals should be affirmed.**

Dated, New York, N. Y., April 15, 1933.

Respectfully submitted,

EDWARD CORNELL
*Counsel for Central Hanover Bank and Trust Company, as Trustee under Consolidated Mortgage of Manhattan Railway Company.*

H. C. MCCOLLOM,
*Of Counsel.*

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# Supreme Court of the United States

OCTOBER TERM, 1932.

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*Respondent.*

IN THE MATTER
*of the*
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

*Certiorari to the United States Circuit Court of Appeals for the Second Circuit.*

## BRIEF ON BEHALF OF THE CITY OF NEW YORK AS AMICUS CURIAE AND MOTION FOR LEAVE TO FILE THE SAME

ARTHUR J. W. HILLY,
*Corporation Counsel,*
*City of New York.*

EDGAR J. KOHLER,
FRANK E. CARSTARPHEN,
*Of Counsel.*

# Supreme Court of the United States

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*Respondent.*

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IN THE MATTER

*of the*

INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

---

*Certiorari to the United States Circuit Court of Appeals for the Second Circuit.*

## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

May it Please the Court:

The undersigned, as counsel for The City of New York, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*. The City's interest in the case, both pecuniary and as *parens*

*urbis*, is outlined in the accompanying brief (pp. 1-4) and the resolution of its Board of Estimate and Apportionment (pp. 43-44). The City's pecuniary interest in the subways involved is estimated at $309,186,421.71 and they are operated under contracts with it, providing for continuous carriage over them and the Manhattan Railway Company's lines at certain points at a single fare of five cents. In the receivership Court, Judge Manton directed service upon the Corporation Counsel of all papers, including notices of motion, and also ordered that the City might, without intervening or appearing, be heard from time to time to make suggestions to the Court on matters affecting the public interest or the City's interest as owner of the subways and the grantor of the elevated railroad franchise, so that the City occupied below substantially the status of *amicus curiae*.

Counsel for all the parties have consented to the granting of this motion.

Respectfully submitted,

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Corporation Counsel.

EDGAR J. KOHLER,
FRANK E. CARSTARPHEN,
Of Counsel.

April 14, 1933.

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# Supreme Court of the United States

OCTOBER TERM, 1932

Nos. 711 and 721

BENJAMIN F. JOHNSON,
*Petitioner,*

LILLIAN BOEHM,
*Petitioner-Intervenor,*

vs.

MANHATTAN RAILWAY COMPANY *et al.*,
*Respondent.*

THE AMERICAN BRAKE SHOE & FOUNDRY COMPANY,
*Respondent,*

vs.

INTERBOROUGH RAPID TRANSIT COMPANY,
*Respondent,*

IN THE MATTER
of the
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

*Certiorari to the United States Circuit Court of Appeals for the Second Circuit.*

## *BRIEF ON BEHALF OF THE CITY OF NEW YORK,*

*Amicus Curiae.*

(Originally a defendant in the Johnson Suit.)

### *Statement.*

In the *American Brake Shoe & Foundry* suit, in which Judge Manton appointed the Receivers, the City of New York was not made a party defendant. Under instructions from

the Board of Estimate and Apportionment the Corporation Counsel stated to the Court at one of the first hearings in the cause that the City did not ask to intervene, though in certain eventualities it might wish to take action in the Federal or State courts for the protection of the City's property and other rights, and asked in the meantime that the City as an interested public authority, following the practice pursued in previous Federal receiverships of traction companies of New York City, be accorded the courtesy of having copies of all papers, including notices of motion, furnished to the Corporation Counsel. He furthermore said that, without intervening or appearing (except by special appearance and in reality as *amicus curiae* if the Court would so permit), the City might desire occasionally to make suggestions to the Court on matters affecting the public interest or the City's interest as owner of the subways and the grantor of the elevated railroad franchises. The Corporation Counsel made this request pursuant to a resolution of the Board of Estimate and Apportionment of the City of New York, adopted September 30, 1932, copy of which resolution is annexed as Appendix A to this brief. Judge Manton approved of this course of procedure, which has since been followed and the City has accordingly occupied substantially the status of *amicus curiae* in the Court conducting the receivership.

In the *Johnson* suit the City was made a party defendant, but it participated in no way in the controversy as to whether Judge Manton had acted lawfully or within his jurisdiction and power in appointing Dowling and Murray, Receivers of the Interborough Rapid Transit Company, or Roberts, Receiver of the Manhattan Railway Company.

In the hearing before Judge Woolsey October 18th, 1932, at the request of counsel for the City, who explained that the City expected to move to dismiss the complaint for failure to state a cause of action as against it, Judge Woolsey inserted in his own handwriting in the order of consolidation he that day settled and signed, the following words, "The City of New York, defendant in equity No. 71-153 neither consenting nor opposing." (Record, p. 983, folio 2947, pp.

992-994, folios 2976-2981). The original order on file in the Clerk's office of the U. S. District Court so recites, but by typographical error, the order of consolidation as printed in this Certiorari Record (pp. 722-724, folios 2164, 2167) reads "The City of New York, defendant in equity No. 71-153 neither consenting *nor appearing*". "*Nor appearing*" is erroneous and should read "*nor opposing*". The further fact is, as appears outside this Record, but will not be disputed, that the City ceased to be a party to the *Johnson* case and to the consolidated cause, these suits being discontinued as to it by order of the District Court made and filed October 24, 1932, upon consent of all the parties.

The Court in the recent five cent fare case of *Gilchrist* vs. *Interborough Rapid Transit Company*, 279 U. S. 159, had occasion to consider the relations of the City to the Interborough, and indeed the opinion of Mr. Justice McReynolds (279 U. S. at pp. 189-211) contains a resume thereof.

The City owns the most important railroads covered by this receivership, to wit, the municipal subways operated by the Interborough under Contracts Nos. 1, 2 and 3, the City's financial stake therein being $309,186,421.71. (See Appendix A to this brief.) The City is also grantor of the franchises for the elevated lines, including the franchises granted by the "Certificates" of 1913 for elevated extensions and third tracks. The indirect interest of the City in this litigation, though not as a party, is apparent. As an investor and proprietor and as grantor of franchises, and also as *parens urbis*, charged with the responsibility of protecting the travelling public, the City feels a deep concern which prompts it to submit this brief as *amicus curiae*. (*The Employers' Liability Cases*, 207 U. S. 463, 490; *State of North Carolina, through Brummitt, Attorney General*, vs. *Southern Railway Company*, 30 Fed. (2d) 204, 210-11; *Robinson* vs. *Lee*, 122 Fed. Rep. 1010, 1011, affirmed, 196 U. S. 64, 65.)

At this particular time the City has an additional and special interest in all of these matters. Under the Public Service Law of the State of New York (Chapter 48 of the Consolidated Laws, Article 7, as amended by Chapter 689 of the Laws of 1931) the Transit Commission of the State

with the approval of the Board of Estimate of the City is charged with the duty of preparing a plan for the relief and improvement of transit in New York City by endeavoring to combine and unify the existing rapid transit and other railroads. The present Mayor of the City of New York has within the past month taken the initiative in actively starting negotiations with representatives of the various groups of security holders of the principal rapid transit companies of the City including the Interborough and Manhattan, with a view to agreeing upon a basis for such plan of unification. By reason of this responsibility with respect to a plan of unification the City is on the one hand in a position which calls for impartiality on its part in its attitude toward the various railroad companies and their respective groups or classes of security holders, and on the other hand the City is naturally opposed to any steps litigative or otherwise that would tend further to separate and disintegrate the railroads which it is the legislative command to the Commission and the City to endeavor to bring into closer unity.

Without involving the City in controversies of this receivership which are none of its concern, we therefore ask leave to call attention as *amicus curiae* to certain aspects of the situation and to proffer certain suggestions in the succeeding Points. The Corporation Counsel is hopeful that this brief may in any event aid the Court in avoiding any incidental decision or observation in its opinion which might embarrass or throw a cloud on the rights of the City and travelling public which they may be called upon to assert in another forum or conceivably in subsequent proceedings in the Courts below.

## POINT I.

**In disregard of principles enunciated by this Court the Interborough and affiliated parties are threatening to convert this receivership into an instrumentality for disrupting and disintegrating the system of subway and elevated lines which the Interborough is under obligations by franchise and by contract with the City (which obligations have the force of law) to operate as an integrated system on a five cent fare with certain rights of free transfer as between elevated and subway lines.**

After the decision of this Court in *Gilchrist* vs. *Interborough Rapid Transit Co.*, 279 U. S. 159, which relegated to the State courts the litigation over the attempt of the Interborough to secure an increase of the five cent fare stipulated in its contracts with the City of New York, the attorney for the Interborough in a brief filed June 9, 1931, before the New York Court of Appeals, by way of reply to a brief of the Corporation Counsel, made a final appeal to the highest State tribunal to so construe the law as at least to adjudge that the five cent fare on the privately owned elevated lines could be increased in the exercise of the State's regulatory power, even if the like fare on the City-owned subway lines were held to be contractual and inviolable in character. In that brief the Interborough counsel used the following language:

> "In the truest sense and in spite of anything the City or the Commission can argue, *the decision of this Court will separate the elevated and the subways as to fares, in one way or another.* Unless this Court holds the elevated lines entitled to a reasonable and adequate rate of fare based on its own independently determined facts and regardless of the subway fare and the subway facts, separation of the elevated and the subway lines and their fares is inevitable and not remote. All of the earnings the Interborough Company gets out of the subway operations, as its preferential return on its investment in the subway properties before 1913, goes to make up the deficit on the

elevated and has now become insufficient for that purpose.

This situation could not continue much longer; and the question is not whether the elevated shall be separated from the subways in respect to rates of fare, but whether *this separation shall be accomplished* through a reasonable increase in fares by a fact-finding tribunal executing the basic policy of the State, *or through a violent dismemberment of a great instrumentality of public service.*" (Italics ours.)

The attorney for the Interborough who filed that brief is the same one who represents the Interborough in the instant causes and who as solicitor for that Company filed its answer consenting to the present receivership. We challenge the learned attorney to say whether this language we have quoted from his brief in the New York Court of Appeals, to the effect that a separation as to fares between the subways and the elevated lines will be effected if not by an increase granted in the exercise of the State's regulatory power then "through a violent dismemberment of a great instrumentality of public service", refers or can refer to anything else than a dismemberment effected by lopping off the Manhattan lease in a receivership.

It may be well at this point to quote the language of the New York Court of Appeals in that case in affirming the lower State Courts and sustaining the contractual and inviolable character of the five cent fare as applicable over the privately owned elevated lines as well as over the City-owned subway lines operated by the Interborough. Speaking by O'Brien, J., that Court said in *City of New York* vs. *Interborough Rapid Transit Company*, 257 N. Y., 20, 36:

> "Although expressions of the detailed purposes of these instruments [the Elevated Extension Certificate and Contract No. 3] are incorporated in separate documents, they were executed on the same day and are so interlocked and combined in their common scheme, so inextricably interwoven, that each must be regarded only as part of an integral transaction."

The Court also squarely rejected the plea of Interborough counsel, above quoted, and said (italics ours) (pp. 37-8):

> "*Separation of rates* on a continuous trip *partly over elevated lines* and *partly over subway lines*, as these roads are defined in the contract [Contract No. 3] and the certificate [Elevated Extension Certificate] *not only would seriously interfere with the avowed purpose of these instruments but, in addition, would create difficulties in administration* similar to those which were recognized in *Matter of Evens* v. *Public Service Comm.* (246 N. Y. 224)" (italics ours).

Parenthetically it may be noted that in the bill of complaint in the Johnson suit (Record, p. 42, folios 124-125) it appears that in the year 1922 Mr. Hedley, President and General Manager of Interborough, stated among other things to the Manhattan stockholders that if a receiver were appointed for Interborough—

> "2. Such receiver would not be permitted to pay the back 7% dividends nor indeed any rental for the Manhattan lines.
>
> "3. Such receiver would therefore temporarily operate the lines in the public interest and the earnings would doubtless be impounded during such operation. No dividends would be paid during such period.
>
> "4. The property would ultimately be surrendered by the receiver to its owners, the Manhattan stockholders.
>
> "5. The Manhattan Company would have to take its property and operate it to preserve its franchises from forfeiture." (Folios 124-125.)

This receivership was instituted as a consent or friendly receivership in the customary manner with which the City of New York and its travelling public have within the last few decades become unfortunately all too familiar, namely, the bringing of a suit in the Federal Court by a general creditor for the administration of the affairs of a financially embarrassed corporation and the simultaneous interposition of an answer by the defendant corporation admitting the alle-

gations of the complaint and joining in the prayer for the immediate appointment of a receiver. In this instance, the general creditor selected to institute the suit was American Brake Shoe & Foundry Company which in 1919 had played a like role as plaintiff in a similar general creditor's suit instituted against the New York Railways Company operating important street surface railways in the Borough of Manhattan, City of New York, at that time under the same ownership and control as the Interborough and represented in fact by the same General Counsel who now represents the Interborough.

The complaint herein upon which the Interborough receivership is founded alleges, by way of the usual character of averment, that there are overdue claims which the defendant is at present unable to pay, and

> "that the holders thereof are pressing for payment thereof; that some of said creditors may bring suits in respect of their said claims and may levy execution upon the equipment and property of the defendant used in the operation of said rapid transit subway and elevated lines and on the material and supplies and other property of defendant on hand and kept by the defendant for necessary use in operating said railway systems, and plaintiff alleges that there is grave danger that the defendant may thereby be deprived of the use of equipment, rolling stock and other property essential to the effective and economic operation of the said railway systems * * *, and that it is essential to the interest of all the creditors of the defendant and the interest of the public and of the plaintiff that the property of the defendant should not be sacrificed * * *. (See complaint, para. 15, Rec. pp. 164, 165, fols. 491, 493)

This complaint further alleges on information and belief,

> "that the only means whereby the defendant can meet its obligations *under said contracts, certificates and leases*, and pay its floating indebtedness and discharge its current obligations is by the continued maintenance and *operation of said railroads by an uninterrupted use thereof;* and that any suits upon or process against its properties or its revenues would seriously

> embarrass and cripple the defendant and diminish, if not destroy, its power successfully to operate said railroad systems; * * * * ". (See para. 16, Rec. p. 166, fols. 496, 497.)

The same paragraph of the complaint further avers:

> "that during the last year the elevated and rapid transit subway lines operated by the defendant carried over 1,000,000,000 passengers, and that it is of vital importance to the people of the City of New York that said elevated and rapid transit subway lines shall continue to be operated and to such end it is of like importance that said systems be preserved * * * * ". (Rec. p. 166, fol. 497).

The complaint further alleges

> "that unless the Court in view of the facts above set forth shall take said railroad systems of the defendant into judicial custody * * * that immediately upon default, individual creditors, and particularly individual holders of the Ten Year Secured Convertible 7% Gold Notes of the defendant will assert their rights and remedies in different courts; * * * ". (page 167, folio 499).

Furthermore, the prayer for relief in this complaint asks *inter alia*

> "That pending such marshalling and administration and final decrees, *and for the purpose of preserving intact the property* and assets of the *defendant* a receiver or receivers may be appointed for the defendant and of all the property and assets of the defendant * * * * *including all railroads, leased or operated* * * * * and with all the incidental powers ordinarily vested in receivers in like cases and with full power and authority to operate the railroads, property and assets of the defendant * * * * * to protect and preserve the corporate franchises, privileges and property * * * * * and to protect and preserve the said railroads, property and assets from being sacrificed under any proceedings which can or may be taken * * * * and to do any and all acts and things which may be necessary to preserve the valuable rights, contracts and franchises of the defendant or otherwise requisite or proper." (Rec. pp. 168, 169, fols. 503-505).

The answer of the defendant Interborough Rapid Transit Company admitted all the allegations of the bill of complaint, joined in the prayer of said complaint, and prayed that

> "this Court, sitting in equity, may take possession of the railroad system of the defendant and of all its property and assets through the appointment of a receiver or receivers as prayed in said bill of complaint and thereby protect and preserve the corporate franchises, privileges, property and assets and preserve the corporate existence of the defendant and protect and preserve its said system * * * * and do any and all acts which may be necessary to preserve the valuable rights, contracts, franchises, property and assets of the defendant; and the defendant accordingly prays * * * * *that this Court will*, for the purposes aforesaid, *appoint a receiver* or receivers as prayed for in said complaint, and empower and authorize such receiver or receivers *to take possession* of the *entire property* and assets of this defendant *and to* preserve, manage, *operate* and control *the same* * * * * *".* (Rec. pp. 171, 172, fols. 512-515).

The order of the District Court made by Judge Manton August 26, 1932 appointing the receivers ordered, adjudged and decreed that Dowling and Murray be appointed receivers (italics ours):

> "of all the property and assets of the said defendant * * * * *including all railroads owned, leased or operated by said defendant* * * * * *; that the said Receivers be*, and they hereby are, authorized immediately to take possession of the same and to run, manage and *operate the said railroads, properties* and assets in such manner as will in their judgment produce most satisfactory results *so that the operation of the railroad system of the defendant shall be continued in the same manner as at present* and *the public duties obligatory upon the defendant be in all respects discharged* * * * * *".* (Rec. p. 180, fols. 540, 541, 542.)

Although the complainant, the American Brake Shoe & Foundry Company was not a lien or judgment creditor,

nevertheless, in view of the foregoing allegations, consent and proceedings, the appointment of the receivers would appear on the face of the record to be sustainable within the holding of this Court in *Re Metropolitan Railway Receivership*, 208 U. S. 90.

In the Metropolitan Railway Receivership, conducted under Judge Lacombe, the travelling public experienced a great disruption of the street railway system, producing the intended result of a splitting up of five cent fares through disaffirmance of leases which under the New York state statutes carried free transfer privileges in favor of passengers. This occurred in spite of the observations of the Court in that case (208 U. S. at 112) where after stating that

> "a court is a very unsatisfactory body to administer the affairs of a railroad"

the Court proceeded:

> "There are cases—and the one in question seems a very strong instance—where, in order to preserve the property *for all interests*, it is a necessity to resort to such a remedy. A *refusal to* appoint a receiver would have led in this instance almost inevitably to *a very large and useless sacrifice in value of a great property, operated as one system through the various streets of a populous city*, and such a refusal would also have led to endless confusion among the various creditors in their efforts to enforce their claims, *and to very great inconvenience to the many thousands of people who necessarily use the road every day of their lives.*" (Italics ours.)

Similarly, in the Brooklyn Rapid Transit Company receivership, the District Court, Judge Julius M. Mayer sitting, in 1918 appointed an equity receiver upon the suit of a general creditor, and despite the warning uttered by the Corporation Counsel of the City of New York at the inception and at later stages of the receivership that this receivership should not be utilized (as the Metropolitan receivership had been) for dismemberment by disaffirmance of leases and splitting up of fares contrary to the State policy expressed in a statute requiring free transfers between leased

lines, a process of Federal disintegration again ensued, resulting in a dismemberment and increase of fares over practically all the street surface railway lines as theretofore operated by the Company.

In 1919 the New York Railways Company, the successor upon reorganization of the Metropolitan Street Railway, went into a Federal receivership by order made by Judge Mayer. Here again the Corporation Counsel was accorded the status of *amicus curiae* and made protest on behalf of the City against a repetition of this process of dismemberment and disintegration with consequent splitting up and increase of fares. The Corporation Counsel then urged upon the Court that the continuance of the receivership be subject to the condition:

> "that the unity of the system of railroads as now operated by the defendant including all compulsory free transfer privileges in favor of passengers must be preserved until and except as the Public Service Commission or other valid state or local authority shall otherwise prescribe." (See affidavit of William P. Burr, verified March 31, 1919, printed in Official Record of New York Railway Receivership Proceedings, Vol. I, p. 77.

Nevertheless, in this case also, the process of disintegration and consequent increase in fares through abolition of free transfers went forward in the face of the City's continued protests.

In the case at bar the learned counsel to the petitioners have challenged the validity of the receivership on the ground that it was instituted by collusive prearrangement in the nature of a conspiracy to lop off the Manhattan lease and thus relieve the Interborough security holders of the large rental payments which had been making operation under such lease a source of loss to them for many years. (See *Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U. S. 159, 200, also 210). Despite the apprehension which the City naturally felt in this regard, particularly in view of its experience in previous receiverships of street railroad com-

panies, the City is not prepared to join in this challenge to the jurisdiction.

The allegations of the complaint, the admissions and averments in the answer, and the provisions of the order upon which this receivership was instituted by Judge Manton and from which we have quoted above, contain no indication of an intention to disrupt the system, and unless there was proved an intention to deliberately conceal from the Court the true purpose of the receivership, all persons interested had a right to conclude that the receivership was brought to conserve the system as it existed, including uninterrupted operation over the elevated lines. Seven months, however, have now elapsed since the receivers were appointed and enough has developed to make clear that certain Interborough security holders intend, and the Interborough receivers claim power, to use the receivership as an instrumentality for disaffirming the Manhattan lease of January 1, 1903, and this in disregard of the fact that there have been superimposed upon the lease various free transfer privileges without increase of the five cent fare, and important through route obligations, all assumed by the Interborough toward the City and the public by subsequent contracts and the acceptance of subsequent franchises granted by way of extension and enlargement of the lines originally leased from the Manhattan in 1903.

At a hearing before Judge Manton on October 3, 1932, counsel representing the Committee for the protection of holders of Interborough Ten Year 6% Unsecured Gold Notes due October 1, 1932 (of which about $10,000,000 are outstanding), said:

> "Let's talk the reality again, and everybody knows —what possible motive could there be for the Interborough carrying this property at a loss of several million dollars a year more than it can earn, and in a period when its earnings are constantly declining? * * *
>
> "I think everybody knows as a practical matter that there will be an application to cancel that lease. * * *
>
> "I am quite willing to give notice that I will

> make that application very soon—well in a very few days. It is impossible that an application won't be made."

The intentions of certain security holders in this regard have thus been definitely stated. The Receivers' view that there is a power to disaffirm the lease is apparent from their own application recently filed for instructions to excuse them from making further payments to Manhattan bondholders and others called for by the lease while at the same time continuing to hold the leased lines during a so-called trial period. In the petition upon that application, verified March 14, 1933, they said:

> "While the Interborough Receivers assert that they have the absolute legal right to disaffirm the Manhattan lease, if in their judgment it appears in the interest of the receivership estate so to do, it it is not intended by the foregoing recommendations to obtain from the Court at this time any determination as to the existence of such right, and your petitioners therefore recommend that the Court in the order entered on this application reserve full power and jurisdiction hereafter to determine any questions raised with respect to such right of disaffirmance."

Notwithstanding these declared intentions of disaffirmance and these claims of power to disaffirm, made in the Federal Court, neither the Receivers nor any security holders have yet applied to the Transit Commission or to the City, either formally or informally, with a view to making substitute arrangements to preserve the through routes, the free transfers and the five cent fare or to carry out the obligations of the Interborough with reference thereto, in the event of a disaffirmance or cancellation of the lease. Although the City does not challenge the jurisdiction of this receivership in its inception, the City does contend that the drift is distinctly toward an abuse of the receivership and that grave threats now exist that it will be perverted into an instrumentality for further disrupting the transit systems and destroying the valuable rights of the public with respect thereto.

As we understand the decisions and pronouncements of this Court, particularly since *Re Metropolitan Receivership*, 208 U. S., *supra*, even though a consent receivership instituted on general creditor's bill is valid in its inception, nevertheless if the course of the receivership involves abuse and conversion of its aims from the proper object of conservation to a policy of obstruction and frustration particularly of the public policy of the State and locality in respect of a local public utility, that is enough to call for either a vacating of the receivership or else for its continuance only upon condition that such abuse of the process of the Court be eliminated.

In *Re Metropolitan Railway Receivership*, 208 U. S. 90, 111, 112, after recognizing that a Court or its receiver was "a very unsatisfactory body to administer the affairs of a railroad as a going concern," the Court said:

> "* * * we feel that the possession of such property by the court through its receivers should not be unnecessarily prolonged * * *.
>
> The orders appointing the receivers and giving them instructions are most conservative and well calculated to bring about the earliest possible resumption of normal conditions when those who may be the owners of the property shall be in possession of and operate it."

And the Court further added (italics ours), page 112:

> "*We have no doubt, if unnecessary delays should take place, the court would listen to an application* by any creditor, upon due notice to the receivers, *for orders requiring the closing of the trust* as soon as might be reasonably proper, or *else vacating the orders appointing the receivers.*"

In *Joy v. St. Louis*, 138 U. S. 1, the Court said (page 47; italics ours):

> "Considerations of the interests of the public are held to be controlling upon a court of equity, when a public means of transportation, such as a railroad, comes into the possession and under the dominion of the court. These considerations have been recognized and applied by this court in several cases. *Barton v.*

> *Barbour*, 104 U. S. 126; *Miltenberger* v. *Logansport Railway*, 106 U. S. 286, 311, 312; *Union Trust Co.* v. *Illinois Midland Railway*, 117 U. S. 434, 458."

In *Michigan* v. *Michigan Trust Company*, 286 U. S. 334, 345, it was said:

> "Receiverships for conservation have at times a legitimate function *but they are to be watched with jealous eyes lest their function be perverted.*" (Italics ours.)

In the very recent decision of this Court, in *Shapiro* v. *Wilgus*, argued in this term and decided December 5, 1932 (See 77 L. Ed. Adv. Ops. pp. 149, 152), the Court said: (Italics ours.)

> "True indeed it is that receivers have at times been appointed even by federal courts at the suit of simple contract creditors if the defendant was willing to waive the irregularity and to consent to the decree. *This is done not infrequently where the defendant is a public service corporation and the unbroken performance of its services is in furtherance of the public good.* Re Metropolitan R. Receivership, 208 U. S. 109, 111, 52 L. Ed. 412, 413, 28 S. Ct. 219." (Italics ours.)

And the Court added:

> "*Never is such a remedy available when it is a mere weapon of coercion, a means for the frustration of the public* policy of the state or the *locality.*" (Italics ours.)

See also *Harkin* v. *Brundage*, 276 U. S. 36.

At this point it would seem proper to state briefly to the Court, the source and nature of the Interborough's public obligations which have been superimposed upon the Manhattan lease and which have been assumed by the Interborough subsequent to its becoming such lessee of the Manhattan railroad elevated lines early in 1903. Attention should be called to three distinct subsequently imposed public obligations that come within this category.

*First:* The Interborough had been incorporated in 1902, for the express purpose of operating the City-owned subway constructed under Contract No. 1, of which it became the

assignee from the original contractor, John B. McDonald. By an agreement made July 16, 1903, modifying Contract No. 1 to which the City of New York, John B. McDonald and the Interborough Rapid Transit Company were parties, a modification of the routes and general plan for the City-owned rapid transit railroad to be constructed and operated under Contract No. 1 was agreed upon, with the object of providing for a spur connection with the Manhattan elevated lines at Westchester Avenue, near 149th Street. The City, acting by its Board of Rapid Transit Railroad Commissioners, consented to this modification of Contract No. 1 upon the following condition, viz. (Vol. 1 of Exhibits, p. 469):

> "PROVIDED, further, however, and it is expressly agreed, that this agreement shall take effect if and when, and only when, in addition to the consents aforesaid, there shall be duly executed and delivered in form satisfactory to the Board an agreement under seal between the City, the said John B. McDonald, the said Interborough Rapid Transit Company and the Manhattan Railway Company providing and assuring that, during the period of the lease contained in the said contract between the City and John B. McDonald made on or about the 21st day of February, 1900, and every renewal or extension thereof, any passenger upon the said rapid transit railroad traveling along Westchester avenue from the north as far as St. Ann's avenue, shall have the right as part of the same trip and without additional fare, to be carried thence upon the portions of the rapid transit railroad hereby added to the railroad of the Manhattan Railway Company along Third avenue, and thence southerly upon the railroad of the Manhattan Railway Company to any point upon the said railroad south of the intersection of the said Third avenue and Westchester avenue and that any passenger upon the said railroad of the Manhattan Railway Company traveling northerly along said Third avenue as far as Westchester avenue, shall have the right, as part of the same trip and without additional fare, to be carried easterly upon the portion of the rapid transit railroad hereby added along Westchester avenue to St. Ann's avenue, and thence continuing easterly or northerly to any point upon the eastern branch of the

rapid transit railroad as described in the said Routes and General Plan: * * * *."

This proviso was carried out in an agreement dated June 7, 1906, between the City, the Interborough and Manhattan Railway Company, which repeated substantially the provisions contained in the proviso last quoted. (Exhibits, pp. 483-485.)

While the Manhattan Railway Company as a corporation thus also assumed this obligation of free transfer at Westchester Avenue, near 149th Street, its first mortgage bondholders never assented to the same, and their mortgage having been executed in 1890, years prior to this agreement involving free transfers, it is settled law that such agreement for free tranfers is subordinate to the lien of the mortgage and may be rejected by the mortgage trustee and bondholders (*Public Service Commission* v. *Westchester Street Railway Company*, 206 N. Y. 209, 218). In the event of a disaffirmance of the Manhattan lease by the Interborough receivers, the Court would have to turn over the Manhattan property to the Manhattan receiver for operation. This in turn would compel the Manhattan first mortgage bondholders by their trustee to elect to declare the principal of their mortgage debt, amounting to $40,000,000 due and to foreclose the same. Thereby it would become beyond the power of the Manhattan Railway Company, as a corporation, to live up to the obligations of free transfer assumed by it under this agreement of June 7, 1906, executed in fulfillment of the agreement of July 16, 1903, both made with the City of New York. It follows that a disaffirmance by the Interborough receivers of the Manhattan lease without provision first being made for preservation of the free transfer arrangement would clearly disable the Interborough or its receivers from living up to these agreements with the City, calling for free transfer of passengers from subway to elevated lines at the point specified.

Thousands of people daily make use of this arrangement for free transfer from elevated to subway lines at 149th Street. Not only would the cessation of such free transfer arrangement result in grave inconvenience to the traveling public, not only would a discontinuance of it, as a result

of disaffirmance of the Manhattan lease constitute a breach of the agreement of July 16, 1903, which was a supplemental contract in modification of Contract No. 1, but furthermore, by the express terms of Contract No. 3, such breach would also constitute a default by the Interborough under Contract No. 3. (See Contract No. 3, Article II, Subd. 8, Articles XLVII-XLVIII. Exhibits, pp. 285, 356-7.)

Quite independently of the question of the illegality of such a breach of these agreements of July 16, 1903 and June 7, 1906, covering the free transfer arrangement at 149th Street and assuming for the purpose of argument that it would be within the lawful power of the Interborough receivers to disaffirm the Manhattan lease and incidentally discontinue and eliminate these transfer privileges, yet if the indirect result of pursuing such a course would be to make the Interborough suffer a default under Contracts Nos. 1 and 3, manifestly the most valuable asset of the Interborough (namely, its interest as a lessee in those Contracts) would be jeopardized and possibly sacrificed. That the receivers would embark upon a course fraught with such disastrous financial consequences to the receivership estate, which they are charged with the duty to conserve, seems almost unthinkable. However, this dire consequence is surely threatened, unless either there be no attempt at disaffirmance of the Manhattan lease whatsoever or else as an alternative, the receivers first succeed in securing the continuance of this public obligation of free transfer at 149th Street, as it is within the power of the Transit Commission by virtue of specific provision of the statute, to order and provide for in the event of the Manhattan leased lines being returned to its owners for operation.

*Second:* Article VI of the Elevated Extension Certificate granted to the Interborough March 19, 1913, granting it a franchise for the construction and operation of specified extensions to the Manhattan elevated railways held by it under lease, imposed as a condition of the grant the following provision as to fare (Exhibits, pp. 521-522):

> "The Interborough Company shall be entitled to charge for a single fare for each passenger for one

> continuous trip in the same general direction over the Railroads (including the parts of the municipal railroad over which the Interborough Company is provided with trackage rights as in this certificate provided) and the additional tracks (which shall mean the additional tracks authorized by the Commission by certificate to the Manhattan Railway Company bearing even date herewith) and the Manhattan Railroad the sum of five (5) cents but not more. A trip from any point on the Queensboro Bridge Line (including the part of the municipal railroad over which trackage rights are provided) to any point on the Manhattan Railroad or on the Railroads, or a trip from any point on the Manhattan Railroad or on the Railroads to any point on the Queensboro Bridge Line (including the part of the municipal railroad over which trackage rights are provided) *shall be deemed a continuous trip in the same general direction.*"

Article IX of the same Certificate, also made a condition of the grant and as such expressly assumed by the Interborough, provides:

> "The City also agrees to provide the Interborough Company with trackage rights over parts of the municipal railroads to be constructed and to be equipped, maintained and operated under a contract bearing even date herewith between the City and Interborough Rapid Transit Company and over any extensions of such parts, and the *Interborough Company as grantee under this certificate agrees to operate over such parts in conjunction with the Railroads to the end that through service may be provided over such parts over the Railroads and over the Manhattan Railroad*". (Exhibits, p. 524.)

The intent and effect of these provisions is to impose the franchise obligation upon the Interborough of furnishing any passenger on the elevated lines with a continuous ride for the single fare of five (5) cents, not alone over the extensions granted by this Certificate, but also over the specified connected portions of the City-owned lines and *over the original elevated lines leased by the Interborough from the Manhattan in* 1903. The New York Court of Appeals so definitely held in *City of New York* vs. *Interborough Rapid Transit Company*, 257 N. Y. 20, 30, 36-38.

*Third:* Concurrently with the grant of the Elevated Extension Certificate to the Interborough, there was granted what is known as an Additional or Third Track Certificate. While this Certificate was granted to the Manhattan Railway Company as owner, nevertheless the terms of the grant are explicit and clear in providing that the rights granted might be enjoyed by the lessee (referring, of course, to the Interborough) provided such lessee should

> "assume and agree to perform all the obligations which by the provisions hereof are assumed by the Manhattan Railway Company" (Art. XIV; Exhibits, pp. 625-626).

In fact, in the definition section of the Certificate the words "Manhattan Company" are defined as used in the Certificate to

> mean the Manhattan Railway Company, its successors, assigns, *lessee*, * * * except that nothing contained in this definition or in this certificate shall be deemed to vest in any lessee *title* to the authorizations or licenses granted by this certificate". (Exhibits, pp. 587-588).

By agreement entered into by the Interborough and Manhattan, dated March 15, 1913 (Exhibits, p. 493), the Interborough expressly agreed with the Manhattan to

> "perform all acts, covenants, matters and things required of the Manhattan Company by the terms of said certificate."

The Interborough thereafter proceeded to accept the grant and to construct and operate the third tracks. It is significant that in the opinion of the New York Court of Appeals in the five cent fare case, *City of New York* vs. *Interborough Rapid Transit Company*, 257 N. Y. at 30, the Court, O'Brien, J., writing, says (italics ours):

> "On the same day an instrument known as the additional track certificate *was also issued to the Interborough.*"

By the terms of this Additional or Third Track Certificate, it was provided, as a condition of the grants thus assumed by the Interborough, that the railroads constructed over such third tracks:

> "shall be carefully and skillfully operated and with due regard to the safety of the passengers . . . The Manhattan Company (this as heretofore explained covering by express definition, the Interborough as lessee as well as the Manhattan Company as owner) shall during the term of the grants keep the plant and property . . . in thorough repair . . ." (Exhibits p. 605.)

The main object of having these third tracks constructed and operated was to provide for a through route or express service covering and extending over the elevated extensions granted to the Interborough by the Elevated Extension Certificate, the specified portions of connected municipally-owned subway railroads constructed under Contract No. 3, and the Manhattan railroad itself, through the use of these third tracks for such purposes of operation of express trains over the through route; and they have actually been so used right along up to the present time. It is further significant that this Third or Additional Track Certificate expressly provided as a condition of the grant

> "that no * * * grant, conveyance, transfer, lease or assignment and no mortgage hereafter made covering the authorizations or licenses hereby granted shall relieve the Manhattan Company [which by definition includes the Interborough] of its obligations hereunder or be valid unless the same shall have been approved by the Commission." (Exhibits, p. 626.)

Furthermore, it is provided that the express intention of the instrument is

> "that no change in the incorporation of the Manhattan Company or any such successor or future owner *or in the ownership or control of the authorizations or licenses hereby granted, or any of them shall diminish or affect the obligations of the holder of the same.*" (Exhibits, p. 626).

This Third or Additional Track Certificate contains no authority or provision to charge a fare for the ride over these third tracks, thereby further making manifest that the intention of the grant was that the ride to be carried over these third tracks should be merely a part of the continuous ride, which under the Elevated Extension Certificate (Article VI, thereof, hereinbefore quoted) passengers were entitled to over the extensions, the original Manhattan railroad and the specified connected portions of the City-owned subway railroads, all for the single fare of five cents. (See *City of New York, v. Interborough Rapid Transit Company*, 257 N. Y. (*supra*) at pp. 30, 37-38).

It thus clearly appears that the Elevated Extension Certificate taken in conjunction with the Additional or Third Track Certificate simultaneously granted on March 19, 1913, obligates the Interborough as a condition of these franchise grants, to operate the railroads over these additional tracks and furthermore, to carry passengers paying a fare of five cents by way of one continuous trip in the same general direction over the said elevated extensions, the additional tracks, the original Manhattan railroad and the specified connected portions of the City-owned subway.

## POINT II.

**It is well settled that obligations of the character thus assumed by the Interborough in the Elevated Extension and Additional Tracks Certificates, having been made a condition of the constitutional consent of the local authorities under Article III, Section 18 of the State Constitution, have the force of law in the sense that a breach of them constitutes a violation of law. It necessarily follows that these public obligations must be lived up to by and are binding upon the Federal receivers and do not come within the class of contracts as to which receivers have the power to elect to disaffirm and refuse to adopt.**

The Constitution of New York State, Article III, Section 18, as it was amended in the year 1875, provides:

> "But no law shall authorize the construction or operation of a street railroad except upon the condition that * * * the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained * * *."

In *Matter of Quinby* v. *Public Service Commission*, 223 N. Y. 244, 259, Pound, J. said:

> "The power of the local authorities to impose as a condition to giving consent to the construction and operation of a street railroad that a stipulated rate of fare should be charged has been repeatedly upheld." (Citing cases.)

Again Judge Pound said (pp. 261-262):

> "But our Constitution, by requiring the consent of the local authorities, recognizes that our municipalities are *pro tanto* independent of legislative control, exercising some fragment of power, otherwise legislative in character, which has been thus irrevocably transferred by the fundamental law from the legislature to the locality."

The Elevated Extension Certificate of March 19, 1913, undoubtedly constituted the grant of a franchise to the Inter-

borough. Likewise the Additional Tracks Certificate of the same date constituted a grant of a franchise to the Manhattan Railway Company; the obligations contained in which latter grant were imposed by the City upon and assumed not alone by the Manhattan Railway Company but fully as much by the Interborough in its capacity of lessee of such additional tracks. The approval of the Board of Estimate and Apportionment to these two certificates constituted the consent of the local authorities under Article III, Section 18 of the State Constitution. Such consent of the Board to these two franchise grants was made with the Certificates before the Board in the form in which they were finally executed and the Board expressly provided in granting its consent that it should be "in accordance therewith," to wit, in accordance with the terms and conditions of the two Certificates respectively. This would seem clearly to mean that where the Certificates specify as a condition upon which they are granted that a continuous ride of prescribed extent be given to any passenger paying the stipulated rate of fare, the Board of Estimate by giving its consent "in accordance therewith" makes such condition of the Certificates a condition of the consent thereto.

In *Willcox* v. *Richmond Light & R. R. Company*, 142 App. Div. 44; affirmed 202 N. Y. 515, the Court held as stated in the headnote:

> "The refusal of a street surface railroad to issue and receive transfers to and from other lines as required by its charter ratified by the authorities of the municipalities in which it operates and as required by its contract with the municipality, is not a mere violation of a covenant, but is a 'violation of law' as the term is used in section 57 of the Public Service Commission's Law, and the Commission may compel the fulfillment of such obligation".

Since these *public obligations* assumed by the Interborough under these two Certificates have thus the force of a law of the State, as held in the authoritative decisions cited, it follows that such obligations at least do not fall within the class of contracts as to which Federal receivers

have the power to elect to disaffirm and refuse to adopt, this even though it be possible that the *rental or pecuniary obligations* of the lease are disseverable, and can validly be disaffirmed. (See this brief *infra* pp. 28-32). This must be true for two reasons:

(a) The Act of Congress now embodied in Section 124 of Title 28 of the United States Code (formerly Section 65 of the United States Judicial Code) originally enacted March 3, 1887, c. 373, Sec. 2, 24 Stat. 554; Aug. 13, 1888, c. 866, Section 3, 25 Stat. 436) is entitled "Management of property by receivers" and provides:

> "Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate *such property according to the requirements of the valid laws of the state* in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than $3,000, or imprisoned not more than one year, or both."

In *Erb* v. *Morasch*, 177 U. S. 584, construing and applying this act of Congress, the Court held that an ordinance of the City Council of Kansas City, regulating the running of railroad trains through the City, had the force of law within the purview of this Federal enactment. Mr. Justice Brewer delivering the opinion of the Court said (at p. 585):

> "Now, in respect to the Federal questions, we remark, first, that it is the duty of a receiver, appointed by a Federal court to take charge of a railroad, to operate such road according to the laws of the State in which it is situated. Act of August 13, 1888, c. 866, § 2; 25 Stat. 433, 436; *United States* v. *Harris*, *ante*, 305".

In *Paige* v. *Schenectady Railway Co.*, 178 N. Y. 102, the New York Court of Appeals recognized the force of this Federal statute requiring receivers appointed by the Federal Court to conform with the laws of the State, and held that

the act of a Federal receiver of a street surface railroad in attempting to abandon a portion of such railroad without having obtained the approval of the Railroad Commission as required by the Railroad Law to such abandonment was unlawful. Martin, J., speaking for the Court said (p. 114, italics ours):

> "Moreover, in this case the receiver had no authority from the court to thus abandon a portion of the road. *He was required to operate and conduct the business of the road in accordance with the laws of the state, which gave him no authority to abandon any portion of the mortgaged property.* (*Erb* v. *Morasch*, 177 U. S. 584.)" (Italics ours.)

(b) Quite independently of Section 124 of the U. S. Code, well considered decisions have recognized that the rule or doctrine permitting receivers to disaffirm or refuse to adopt unprofitable contracts made by the insolvent corporations of which they are receivers, has no application to a franchise obligation assumed by or imposed upon a railroad corporation as a condition of its enjoyment thereof, by virtue of the terms of the grant from the State or City.

*Pittsburgh & Shawmut Coal Co. et al.* vs. *Delaware & N. R. Co.* 289 Fed. 133, 134

*Westinghouse Electric & Mfg. Co.* vs. *Binghamton Ry. Co.* 255 Fed. 378

*Gas & Electric Securities Co.* vs. *Manhattan & Queens Traction Corporation*, 253 Fed. 453

*Lorain Steel Co.* vs. *Union Ry.* 165 Fed. 500, 502, 503.

## POINT III.

**In 1922 the Legislature amended Section 49, subd. 4 of the Public Service Law by adding a provision specifically designed to clothe the Transit Commission with power to order the continuance of these through routes and transfers of passengers between the Interborough and Manhattan Railways in case the Manhattan lease of 1903 should be abrogated, either by disaffirmance or by reentry of the owners upon the Manhattan leased property. The rights of the City and of the travelling public under this provision have been ignored and should now receive paramount consideration.**

By Chapter 153 of the Laws of 1922, subdivision 4 of section 49 was amended by the addition of the following provision:

> "In case upon the termination of a lease or otherwise the owner or lessor of a rapid transit railroad resumes operation thereof and thereupon such owner or lessor or the lessee discontinues or threatens to discontinue or refuses or threatens to refuse to permit operation over any extension or extensions of such rapid transit railroad or railroads or any of them, or discontinues or threatens to discontinue or refuses or threatens to refuse to permit operation over other railroads on which such lessee had operated under trackage rights, then and in either of those events the commission may order that through cars for the transportation of passengers shall be operated over such extension or extensions and over the tracks of such other railroad over which such lessee may have had trackage rights, and the commission shall have power, after a hearing, to require by order such operating, including the right to order such switch or other connections or interchange tracks as may be necessary, and if so required, to determine as to the division of the expense of the maintenance and operation thereof. The commission may, after a hearing, prescribe the terms and conditions upon which such operations shall be conducted and the manner in which receipts and expenses shall be apportioned.

"Pending the hearing or hearings provided for herein, and the determinations and orders of the commission thereon, the commission shall have power, if in its judgment the public interest requires it, to issue a temporary order requiring said rapid transit railroad companies to receive from each other, and transport for each other, such cars over each other's tracks by way of switch connection or interchange track, and if no such switch connection or interchange track exists, to construct and maintain said switch connection or interchange track; and upon the completion of said hearing or hearings, and the determinations and orders of the commission thereafter made, the terms of the receipt and transportation of cars, and the readjustment of compensation and expense involved, shall take effect as of the original date of such temporary order of the commission.

"If upon the expiration or earlier termination of a lease, the free transfer or interchange of passengers, theretofore in effect and permitted by the lessee of a rapid transit railroad at any point or points between the lines of the rapid transit railroads owned or leased and operated by it, is discontinued or is threatened to be discontinued, the commission shall have power by order to require the companies, by which the said lines of rapid transit railroads may be operated after the termination of the lease, to continue or re-establish such through routes formerly existing, and to establish joint rates, fares and charges for the transportation of passengers thereon in the manner provided by subdivision three of this section.

"Pending the hearing or hearings provided for herein, and the determinations and orders of the commission thereon, the commission shall have power to issue a temporary order requiring the companies then operating said lines of rapid transit railroad to restore the said free transfer or interchange of passengers at the point or points on said rapid transit railroad lines where the said free transfer or interchange was formerly in effect and permitted; and upon the completion of said hearing or hearings, and the determinations and orders of the commission thereafter made, the terms and conditions under which the portion of said joint rates, fares and charges to which each company shall be entitled and the manner in which the same shall be paid and secured, shall take

effect as of the original date of such temporary order of the commission."

At the time this provision was enacted, the Interborough was in financial difficulties, a receivership was under discussion, and the lopping-off of the Manhattan lease was threatened (see this brief, p. 7).

This amendment, still on the statute books, was designed by the Legislature to meet precisely the kind of situation which now seems imminent. If the Interborough receivers and security holders persist in their apparent disposition to procure a disaffirmance or abrogation of the Manhattan lease, clearly the public policy so declared by the Legislature demands that proceedings be taken promptly under the provision quoted, to insure the continuance of through routes and free transfers without increase of fare; yet no effort whatsoever appears to have been made in this direction.

The receiver, the stockholders and the mortgage bondholders of the Manhattan Railway Company have distinctly taken the position that they are opposed to a disaffirmance of the lease (the Manhattan receiver claiming indeed that there is no legal power to disaffirm), and furthermore, that they would not be eager to exercise the legal right of reentry on the demised premises, even if rental payments be delayed.

As for the City's position on this subject, the Corporation Counsel recognizes, that it is a grave question whether the Manhattan lease, in view of the public obligations superimposed upon it and inextricably interwoven with it, can lawfully be disaffirmed within the doctrine relating to disaffirmance of unprofitable contracts by receivers. The concern of the City in this matter is primarily that these public obligations of through route and free transfer of passengers should be preserved intact under the receivership, as they have been in the past. The City is, however, desirous, by reason of the public interest there also involved, that rental payments, if too high, should be reduced to more moderate proportions.

That the rental payments under the Manhattan lease have been entirely too high, has been the viewpoint from

which the Interborough receivers and security-holders have appoached the subject. Proceeding upon the assumption that the lease is disaffirmable if unprofitable, they and their counsel have up to now relied on the right of a receiver to a reasonable time before exercising his election to affirm or disaffirm contracts. During these seven months of receivership, their time and attention have been chiefly directed to investigation, applications to the Court for instructions and controversies with the Manhattan receiver and security-holders as to payments under the lease during the trial period. This has involved complicated questions of fact and of law as to what are the true earnings of the leased properties, and what would be a correct "formula" for the ascertainment of such earnings and what the correct rule may be as to payments to be made during such trial period.

These questions have been the subject of hearings before the Court and of references to the Special Master, before whom voluminous testimony has been taken,—all predicated on the assumption that the lease is disaffirmable. Successive "interim orders" by way purely of "administrative instructions to the receivers" have been applied for, opposed and at times granted, relating to the pecuniary obligations growing out of the Manhattan lease,—all this being done by way of preparedness for a possible disaffirmance of the lease.

In striking contrast to this zealous attention to pecuniary interests, the record of this receivership during these seven months will be searched in vain for the slightest indication of any attention on the part of the Interborough receivers or security holders' committees to the preservation of rights of the travelling public or the continued observance of franchise obligations connected with the lease. Neither these receivers nor these committees have approached the City, in Court or out of Court, with any suggestion whatsoever looking to measures to preserve these public rights and obligations in the event of disaffirmance of the lease.

We respectfully submit that in any discussion of the subject of possible disaffirmance or abrogation of the lease, a paramount consideration which should receive first atten-

tion is the matter of making proper arrangements to preserve the rights of the travelling public, and that every private interest in these properties must be held "*cum onere* the public."

## POINT IV.

**In case the Interborough interests hereafter contend that a disaffirmance of the lease would result in the abrogation of any of the through route and free transfer privileges which have been superimposed upon the lease, any such contention should be submitted to the State Courts, and not to the Federal Receivership Court for adjudication.**

The Corporation Counsel submits that Section 49, Subdivision 4, of the Public Service Law, is broad and flexible enough to permit of the continued uninterrupted enjoyment by the traveling public of the joint route and free transfer privileges now existent, even in the event that the Interborough Receivers are permitted to disaffirm the lease, provided that without further delay they invoke the powers of the Transit Commission and seek its cooperation. Thus *pari passu* with further proceedings in the Receivership Court in the matter of disaffirmance, the Commission can hold its hearings and reach its determination and mold its order. Whether or not the Interborough Receivers will seek this relief depends upon their initiative and such instructions as the Receivership Court may upon application of any of the interested security-holders of the Interborough or Manhattan decide to give them in the premises.

On the other hand, it is conceivable that the Receivers will decline to seek the aid of this State regulatory agency. Possibly it may be contended that the Receivers' alleged power to disaffirm the lease will carry with it the abrogation of these public obligations. Possibly the claim will be asserted on behalf of the Interborough Receivers or security holders that with the disaffirmance of the lease at least some

or all of these public privileges will no longer be operative or enforceable. So it was, that in the case of the Metropolitan, B. R. T. and New York Railway receiverships, the disaffirmance of leases which had been entered into under a State statute authorizing the same, upon condition that there be free transfer privileges between the railway lines of the lessor and lessee, were treated by those Receivers, each in turn as abrogating the free transfer obligations. By parity of reasoning it may be claimed in the instant case by the Interborough Receivers or security-holders that if the Manhattan lease is disaffirmed that will end the public obligations of through route and free transfer which have been superimposed upon such lease. The Corporation Counsel is of the opinion that such a position is wholly untenable; nevertheless, it may be the position taken. In that event or if for any other reason the paramount and controlling character of these public obligations is not admitted and sought to be observed by the Interborough Receivers, controversy is bound to follow.

It is earnestly submitted that the Federal Receivership Court is not the forum in which such a controversy should be litigated or determined. Novel and intricate questions would be involved calling for the construction of State statutes and of consents of local legislative bodies, as well as considerations of State and local policy. Decisions of this Court point clearly to the propriety of choosing the State Court rather than the Federal Court for the determination of questions of this character. See *Rogers* v. *Guaranty Trust Company of New York*, decided January 23, 1933 (77 L. Ed. Adv. Op., pages 382, 386), *Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U. S. 159, 207, and *U. S. ex rel.* vs. *Tyler*, 269 U. S. 13. See also *Dexter* vs. *Bank*, 5 Fed. (2) 1. (C. C. A.)

But there are other considerations also making strongly for the proposition that the State Court is the proper forum, rather than the Federal Receivership Court. It cannot be denied that these controverted questions, if they arise, should be determined as soon as possible. To prevent hardship and inconvenience to the travelling public, these questions should be determined in advance of a disaffirmance,

and not be made the subject of protracted litigation *after* the lease has been abrogated and the leased property turned over to the Manhattan Receiver for separate operation.

Such considerations give added point to the suggestion by the learned counsel for the Interborough Receivers below that a determination of this character at the present time in the Receivership Court would be technically premature, and would be in the nature of an action for a declaratory judgment. This remedy of an action for declaratory judgment is one that may not be pursued in the Federal Court. On the other hand it is a remedy which is open in the State Court to any of the interested parties, including the Receivers.

More than this: The responsibility that devolves upon the Receivership Court itself, as well as upon its Receivers, may well lead to the recognition of the fact that the sooner these questions are determined, the less is the danger of the receivership being abused and perverted into an instrumentality that will unlawfully disrupt and dismember existing transit facilities and work immense inconvenience and unnecessary additional expense in increased carfares to the traveling public. This points to the advantage that can be derived from availing of the *summary remedies* which by special statute are open in the State Court, additional to and far more speedy than an action for a declaratory judgment.

There are two classes of proceedings of this kind that are summary in nature and that are accorded a preference by statute under the laws of the State of New York. Both are remedies which call for the institution of the proceeding by the City or the Transit Commission as plaintiff or moving party. It may well be that the Federal Receivers, under the instructions of the Receivership Court, may invite or facilitate the institution of these summary remedies by the public authorities in order that an authoritative decision may be obtained from the New York Court of Appeals before the receivers' "trial period of operation" has expired. Such a decision would furnish guidance in determining whether there could or should be a disaffirmance of the Manhattan

lease, and also in what manner and to what extent the public rights to through routes and free transfers may be preserved uninterruptedly.

We invite the attention of the Court to the statutes which authorize these special proceedings in the State Court and which, under the well settled rule, could not be brought in the Federal Court, viz:

*First.* Section 9 of the Rapid Transit Act (Laws 1891, Ch. 4, as amended by Laws 1909, Ch. 498, Sec. 4) provides, *inter alia*, as follows:

> "1. The said commission . . . may sue in the name and behalf of the city for which it acts as a commission. It may in the name of and in behalf of the said city . . . apply by mandamus to compel the performance within said city by any corporation or person of any duty or obligation with reference to or arising out of the construction or operation of any railroad under, or by reason of, any grant made or right acquired under this act or the acts amendatory hereof or supplementary hereto, or out of or by reason of any contract made or authorized by any board of rapid transit railroad commissioners within its city or the public service commission . . .
>
> 2. Every action or proceeding brought by the commission, and every action or proceeding in which an injunction is had or sought against the commission or the said city, or against any corporation or person who or which shall have entered into a contract under the provisions of this act, or any act supplementary hereto, or amendatory hereof, by reason of any act or thing done, proposed or threatened under or by virtue of any provision of this act, or any act supplementary hereto, or amendatory hereof, or is sought against any corporation or person claiming or claiming to act under any grant or franchise under this act, or any act supplementary hereto, or amendatory hereof, and every action or proceeding in which the constitutionality of any part of this act, or of any act supplementary hereto, or amendatory hereof, shall or may be brought in question, shall have a preference above all causes not criminal on the calendar of every court, and may be brought on for trial or argument upon notice of eight days for any day of any term on which the court shall be in session."

*Second.* Section 57 of the Public Service Law provides as follows:

> "§ 57. *Summary Proceedings.* Whenever either commission shall be of opinion that a common carrier, railroad corporation or street railroad corporation subject to its supervision is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the State of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time, not exceeding twenty days after service of a copy of the petition, within which the common carrier, railroad corporation or street railroad corporation complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations as the court shall deem necessary or proper to join as parties in order to make its order, judgment or writs effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or both issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief."

*Willcox* vs. *Richmond Light & R.R. Company*, 142 App. Div. 44 (affirmed 202 N. Y. 515), *supra*, is authority for the proposition that under this section, the Commission may

institute a proceeding against a street railroad company that fails to supply the free transfer privilege which was imposed by the local authorities as a condition of the grant of its franchise.

## POINT V

**If this Court should decide that a receivership of the Interborough should continue, the City of New York respectfully suggests that for the protection of its rights this Court impose the following conditions and directions for the conduct of the receivership:**

> **First: That the Receivers should not disaffirm any lease or otherwise impair their present ability to perform all franchise obligations to the City (including the preservation of through routes, free transfers and the five cent fare), without previously making alternative arrangements for furnishing, at the expense of the Interborough, the same through routes and free transfers at the existing fare of five cents and no more.**

These franchise obligations of the Interborough have been discussed in Point I (*supra*, pp. 16-23). They include the duty to furnish through train service over the elevated lines of the Manhattan Railway Company in conjunction with the Jerome Avenue, Webster Avenue and White Plains Road lines in The Bronx and the lines in Queens Borough now operated by the Interborough. Similarly the Interborough is obligated to furnish free transfers between the City-owned lines and the Manhattan elevated lines at 149th Street and Third Avenue in The Bronx.

These franchise obligations are contained, *inter alia*, in the so-called Interborough Certificate and the Supplementary Agreement for trackage rights, both dated March 19, 1913 (Exhibits 4 and 5 in this proceeding; see Record, page 343, folios 1027, 1028; Exhibits, pages 505, 521-2, 524;

651, 654-5), and in an Agreement dated July 16, 1903 (Exhibits, pages 465, 469-470).

It may well be that the Interborough can best perform these obligation by continuing to observe its lease of the Manhattan elevated lines but it would be erroneous to suppose that a disaffirmance or termination of that lease, or even the sale of the Manhattan elevated lines upon foreclosure, would absolve the Interborough from these franchise obligations. On the contrary, such eventualities would merely require the Interborough to obtain and utilize trackage and traffic rights in order to perform its obligations to the City.

It must not be forgotten that a railroad is primarily a public highway and that the primary function of a railway company, such as the Manhattan, is to maintain such highway for the use of trains of other companies, as well as its own trains, without unreasonable discrimination. Thus the granting of trackage rights is an inherent function of a railway company, and apart from the statutory provisions for trackage rights mentioned below, it would be conceivable for the Interborough by agreement with the owners from time to time of the Manhattan elevated lines to arrange for the trackage and transfer rights requisite to satisfy the Interborough's obligations to the City, even if the lease were abrogated.

*Baldwin, American Railroad Law*, pages 7, 8, 462.

*Lake Superior & Miss. R. R. v. U. S.*, 93 U. S. 442, 446-451.

*Union Pacific v. Chicago, R. I. & P. Ry.*, 163 U. S. 564.

The Interborough and its Receivers are not limited, however, to mere negotiations with the owners of the Manhattan lines for maintenance of such trackage and transfer arrangements in case of disaffirmance or termination of the Manhattan lease. § 49, subdivision 4 of the Public Service Law, as amended in 1922 makes specific provision for this contingency (see Point III, *supra*.)

For present purposes it is unnecessary to consider

whether the existing Manhattan lease is part of a "unitary franchise" including the franchises under the Interborough and Manhattan Certificates and Contract No. 3. It is of the utmost importance, however, that the binding obligations of the Interborough Company, sanctioned by franchise, by contract and by law, to furnish through transportation and free transfers, as above described, upon a five cent fare, be strictly observed; and if the Court sees fit to continue this receivership, we respectfully ask that the Court prevent its abuse by admonishing that the Manhattan lease should not be disaffirmed without previous consummation of arrangements for compliance by the Interborough and its Receivers with their obligations above described.

**Second: That if the receivership is to be continued, the Receivers be instructed to use every effort to effect an extension, renewal or refunding of the past due Interborough notes.**

It can hardly be contended that there would be any justification for this receivership if the two note issues which recently matured, were refinanced. As the Record itself indicates (page 535), the Interborough has adequate operating income and resources to care for all current requirements. The matter of first importance for the Interborough at this time is to refinance its capital maturities and obligations as other railroad companies and public utilities are doing, and the Receivers should not be permitted to devote their primary efforts and attention to projects for disintegrating the traction system while this primary duty of arranging for refinancing is neglected by all concerned.

If the receivership is to be continued, we respectfully submit that the Receivers should be admonished to use their best efforts to effect such refinancing.

**Third: That if the receivership is to be continued, it should be expressly without prejudice to the right of the City to have its rights under its contracts with the Interborough and under grants of franchises and other rights to the Interborough**

**and to the Manhattan Railway Company, declared and enforced from time to time in appropriate proceedings in the Courts of the State of New York.**

See Point IV (*supra* pp. 32-7).

As to such matters the observation of this Court in *Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U. S. 159, 207, is very much in point:

> "The record is voluminous; the contracts between the parties are complex; the relevant statutes intricate. No decision of this Court or of any court of New York authoritatively determines the questions at issue. The basic one calls for construction of complicated State legislation."

**Fourth: That if the receivership is to be continued, the receivers be instructed to adhere to the strictest economy and to avoid all unnecessary expenditure in the further conduct of the receivership.**

Under the provisions of Contract No. 3 the City has a vital concern that the expenditures of the receivership be kept within as low limits as is possible. In the case of the Brooklyn Rapid Transit Receivership, which involved the operation by the Receiver of the City-owned railroads constructed under Contract No. 4, and as an aftermath of such Receivership, the Transit Commission in behalf of the City filed objections as permitted under Contract No. 4, to the charging of many unusual and temporarily increased expenditures entailed by the Receivership as part of the operating expenses which the Receiver had claimed the right to include as such. A compromise finally was effected. Under the scheme of Contract No. 3, as was the case with Contract No. 4, objections of this character would not be litigated in the receivership Court, but the Transit Commission has the right to make objections which, if not acceded to, are referred to arbitrators for determination. That such additional Receivership expenses should be kept as low as possible is of interest to the City of New York because the greater such

expenses be, the further is the City's deferred return on its investment postponed.

Messrs. Dowling and Murray, the two Interborough receivers, applied to the receivership court for interim allowances at the rate of $5,000 per month to each of them. The Corporation Counsel, appearing specially on the hearing upon this application and being permitted by the Court to state his views on behalf of the City as *amicus curiae*, opposed such interim allowances as excessive. For the Court to allow these receivers a basic compensation of $60,000 a year to each of them, by way of interim allowance, which in the usual way would at the termination of the receivership, be enhanced by large additional awards to them, may result in giving to each of these receivers compensation greater than that received by the President of the United States. Despite this protest voiced on behalf of the City of New York, the Court has ordered "interim" allowances of $30,000 "on account" to each of these receivers.

This Court in *Harkin* vs. *Brundage* 276 U. S. 36, (decided in 1928) Mr. Chief Justice Taft speaking, in the happier days that preceded the present world depression, said (at p. 57): (italics ours)

> "The Federal court should, before surrender, fix and pay the compensation due to its officers for the work done by them and, in doing so, should take care to fix the compensation *within limits which are plainly reasonable.*"

**Fifth: That if the receivership is to be continued, the receivership Court should be instructed to terminate the receivership as speedily as possible.**

In *Re Metropolitan R. Receivership* 208 U. S. 90, 111, this Court, speaking by Mr. Justice Peckham said (italics ours):

> "* * * we are not unmindful of the fact that a court is a very unsatisfactory body to administer the affairs of a railroad as a going concern *and we feel that the possession of such property by the court through its Receivers should not be unnecessarily prolonged.*"

Mr. Justice Peckham further said (page 112, italics ours):

> "The orders appointing the Receivers and giving them instructions are most conservative and well calculated to bring *about the earliest possible resumption of normal conditions when those who may be the owners of the property shall be in possession of and operate it. We have no doubt, if unnecessary delays should take place, the court would listen to an application by any creditor upon due notice to the Receivers for orders requiring the closing of the trust as soon as might be reasonably proper or else vacating the orders appointing the Receivers.*"

Despite the admonition of this Court, this Metropolitan Street Railway receivership lasted from September, 1907 until December, 1911, a period of over four years. The federal receiverships of the Brooklyn Rapid Transit Company and of the New York Railway Company each lasted even longer. In all three of these previous receiverships, mortgage foreclosures followed promptly upon the heels of the institution of the general creditor's suits; and unquestionably in each of them a far more serious condition of insolvency existed than here. No bill of foreclosure of the Interborough mortgage has been filed in the instant case.

A termination of these proceedings could be effected in a few months and the threatened federal disintegration and disturbance of the rights of the travelling public be prevented, if the terms suggested in this Point be imposed by this Court as condition of the continuance of the receivership.

Dated, New York, April 17, 1933.

Respectfully submitted,

ARTHUR J. W. HILLY,
Corporation Counsel.

EDGAR J. KOHLER,
FRANK E. CARSTARPHEN,
of Counsel.

# APPENDIX A

## BOARD OF ESTIMATE AND APPORTIONMENT CITY OF NEW YORK

(Cal. No. 674)

Whereas, Heretofore and on the 26th day of August, 1932, there was filed a bill of complaint of the American Brake Shoe & Foundry Company, as plaintiff, against the Interborough Rapid Transit Company, defendant, in the District Court of the United States for the Southern District of New York, seeking the appointment of an equity receiver; and

Whereas, Thereafter and on the 26th day of August, 1932, the defendant admitted the allegations of the complaint and consented to the appointment of the receiver; and

Whereas, Thereafter and on the 26th day of August, 1932, the Honorable Martin T. Manton, United States Circuit Judge, having designated himself to sit as District Judge, appointed temporary receivers, the Honorable Victor J. Dowling and Thomas E. Murray, Jr., and in the same order directed that all parties in interest show cause on the 22d day of September, 1932, at 10.30 a. m., why the said receivership should not be continued during the pendency of this suit and setting forth that upon the hearing thereon any other creditor or the defendant or other party in interest may be heard; and

Whereas, The City of New York has heretofore entered into contracts known as contracts numbered 1, 2 and 3, with the Interborough Rapid Transit Company for the operation of certain rapid transit subway lines in The City of New York; and

Whereas, The City of New York has expended in construction of said subway lines the sum of $178,908,046.92; and

Whereas, For the purpose of creating a sinking fund and paying the interest upon its bond issue, The City of New York has expended and set aside the sum of $70,975,131.53; and

Whereas, Under the provisions of contract number 3 the above mentioned sum and the additional sum of $43,374,604.37 is the amount that has accumulated as the City's share from the operations of the subway under contract number 3; and

Whereas, The interest on these two sums amounts to the sum of $34,210,610.39, making a sum total of $148,560,346.29 upon which there has been paid by the present lessee to June 30, 1932, the sum of $18,281,971.50, leaving a balance due the City of $130,278,374.79; and

Whereas, The total interest of the City in the subway is the sum of $309,186,421.71; be it

Resolved by this Board, The Corporation Counsel of The City of New York is instructed to take such steps as from time to time he shall deem necessary and proper for the protection of the above enumerated interest of The City of New York under contracts numbered 1, 2 and 3 with the Interborough Rapid Transit Company in the said receivership either before the Federal Courts or in the State Courts to duly protect the interests of The City of New York; be it further

Resolved, That the Corporation Counsel of The City of New York be instructed to appear specially in the pending receivership and seek direction from the Court to have all papers and proceedings, motions and decrees served upon him and submitted for his consideration so that the City and this Board may be apprised at all times of the progress of the receivership in order that the Corporation Counsel may thereby be enabled to take such steps either in the receivership or otherwise as shall be deemed best for the protection of the interests of The City of New York.

A true copy of resolution adopted by the Board of Estimate and Apportionment, September 30, 1932.

JOSEPH F. HIGGINS,
Assistant Secretary.

# SUPREME COURT OF THE UNITED STATES.

Nos. 711 and 721.—October Term, 1932.

| | | |
|---|---|---|
| Benjamin F. Johnson, Petitioner, 711 *vs.* Manhattan Railway Company, et al. | } | On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit. |
| Lillian Boehm, Petitioner, 721 *vs.* Manhattan Railway Company, et al. | } | |

[May 29, 1933.]

Mr. Justice Van Devanter delivered the opinion of the Court.

These cases exhibit an acute controversy between the Senior Circuit Judge of the Second Circuit and the District Judges of the Southern District of New York respecting the authority of a judge specially assigned to that district—particularly the Senior Circuit Judge when so assigned—to entertain an application for the appointment of receivers in a suit in equity.

Among the rules of the District Court for that district was one whereby a particular trust company was designated as a standing receiver in bankruptcy, and effect was given to that rule in all bankruptcy proceedings. There was no such rule respecting receivers in suits in equity, and the District Judges all regarded themselves as free in appointing such receivers to select any individual or trust company deemed competent and suitable for the particular task. But not infrequently they selected as an equity receiver the trust company which was designated by rule as a standing receiver in bankruptcy proceedings. The nature and importance of the equity receiverships for which a trust company was selected are not clearly disclosed in this record, but it is reasonably apparent that in no instance was the receivership at all comparable in scope or importance with the railroad receivership with which the present litigation is concerned.

In 1930 the Senior Circuit Judge, acting under 28 U. S. C., § 22, and reciting that the public interest required it, assigned himself to hold at any time a session or sessions of the District

Court for that district, for the purpose of trying causes and entertaining and disposing of any matter which might come before him.

In June, 1932, at the suggestion of counsel in an intended suit in equity for the appointment of receivers for the Fox Theatres Corporation, the Senior Circuit Judge sought informally to persuade one or more of the District Judges that a trust company ought not to be selected as receiver, but failed to secure an acceptance of his view. Thereupon, acting under his assignment of 1930, he entertained the application for a receiver and appointed individual receivers.

This action of the Circuit Judge was followed a few days later by the adoption and promulgation by the District Judges of two new rules, known as 1-a and 11-a, effective July 1, 1932, and apparently designed to limit or restrict the action of assigned judges in that district. These rules will be set forth later on.

August 25, 1932, counsel representing the parties in an intended suit in equity by the American Brake Shoe and Foundry Company against the Interborough Rapid Transit Company, informed the Senior Circuit Judge that an application for the appointment of receivers would be made in that suit, and laid before him an affidavit, entitled therein, alleging generally that a trust company or other corporation would not be a suitable receiver, and particularly that the defendant company's complicated and involved daily operations, its enormous staff of operating officials and employes, its contracts and relations with the City of New York, and the use of its facilities by the public, required that the receiver or receivers be a competent individual or individuals who could give constant and undivided attention to the matter. Thereupon the Senior Circuit Judge, conceiving that a District Judge might select a corporate receiver and that this would be unwise and should be prevented,[1] concluded to assign, and did assign, himself to hold a District Court for the Southern District, "particularly to hear and determine all applications and proceedings" in the intended suit for a period beginning that day and continuing until the suit came to an end. This assignment, like that of 1930, recited that it was made under 28 U. S. C., § 22, and that the public interest required it.

The statute referred to in the two assignments provides:

[1]See American Brake Shoe and Foundry Company *v.* Interborough Rapid Transit Company, 1 Fed. Sup. 820, 825-827.

"Sec. 22. The Chief Justice of the United States, or the circuit justice of any judicial circuit, or the senior circuit judge thereof, may, if the public interest requires, designate and assign any circuit judge of a judicial circuit to hold a district court within such circuit. . . .

"During the period of service of any judge designated and assigned under this chapter, he shall have all the powers, and rights, and perform all the duties, of a judge of the district, . . . to which he has been assigned (excepting the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds)."

The new rules adopted by the District Judges declare:

"1-a. Any judge designated to sit in the District Court for the Southern District of New York, shall do such work only as may be assigned to him by the senior district judge."

"11-a. All applications for the appointment of receivers in equity causes, in bankruptcy causes and any other causes (except a receiver in bankruptcy may be appointed by a referee as provided in the Bankruptcy Rules), shall be made to the judge assigned [meaning assigned by the District Judges in their division of business] to hold the Bankruptcy and Motion Part of the business of the court and to no other judge."

Immediately after making the assignment last mentioned, the Senior Circuit Judge turned to 28 U. S. C., § 27, which declares:

"In districts having more than one district judge, the judges may agree upon a division of business and assignment of cases for trial in said district; but in case they do not so agree, the Senior Circuit Judge of the Circuit in which the district lies shall make all necessary orders for the division of business and the assignment of cases for trial in said District";—

and he then made and signed the following order:

"And whereas, Martin T. Manton, a Circuit Judge of the Second Judicial Circuit of the United States designated and assigned to hold a District Court in the Southern District of New York in said Circuit, and acting as District Judge for the Southern District of New York in this Second Judicial Circuit, does not agree upon the division of business and assignment of cases for trial in the Southern District of New York, as provided in and pursuant to the rules of court for the Southern District of New York, heretofore adopted by the then United States District Judges for the Southern District of New York; it is hereby

"Ordered, adjudged and decreed that, for a period of thirty days beginning with this day, all applications for the appointment of receivers in equity causes in the Southern District of New York

may be made not only to the district judge designated to hear such application pursuant to Rule 11-a of the General Rules of the District Court for the Southern District of New York, but also to Martin T. Manton, Circuit Judge designated to act as District Judge to hold a District Court for the Southern District of New York."

That order was filed and entered in the District Court, and on August 26 the American Brake Shoe and Foundry Company filed therein its bill of complaint against the Interborough Rapid Transit Company, together with the affidavit before mentioned. The bill disclosed that the plaintiff was a simple contract creditor, suing on its own behalf and on behalf of all other creditors who might choose to join in the suit, and that the defendant was engaged as a public carrier in operating an extensive system of transportation within the City of New York and its environs; set forth with much detail that the defendant was in greatly embarrassed financial condition, had made default in the payment of taxes and other claims, and could not avoid making default in the payment of instalments of interest and principal about to fall due upon bonds and other obligations secured by mortgages; alleged that its properties were in danger of being dismembered and largely wasted through competitive efforts by its many creditors to obtain satisfaction of their claims, that such wasteful strife would seriously impair and interfere with the discharge of its duties as a public carrier, that its properties could be preserved for equitable distribution among those entitled thereto only through the intervention of a court of equity, and that such intervention would make for a realization for all of the creditors of a substantially larger amount than if that relief were not granted. The prayer was that receivers be appointed to take charge of and preserve the defendant's properties, continue the operation of its railroad system for the accommodation of the public, and collect and properly appropriate the income until the final decree, and that the court marshal and administer the assets and by its decree ascertain and enforce the rights, liens and equities of the several creditors.

The suit plainly was within the jurisdiction of the District Court as a federal court. The parties were citizens of different states and the amount or value in controversy was in excess of the minimum prescribed in the jurisdictional statute.

Immediately after the bill was filed the defendant appeared and, conformably to a resolution of its board of directors, answered the

bill, admitted the allegations therein, joined in the plaintiff's prayer and consented to the appointment of receivers.

Later in the same day, August 26, the parties appeared before the Senior Circuit Judge, sitting under the assignment and order of the day before; and, after examining the bill, affidavit and answer, the judge made an interlocutory order appointing temporary receivers and granting the usual temporary injunction against the institution of suits against the defendant company, except on leave granted in that suit. The order also directed (1) that on September 22, the parties show cause before him, as such assigned Circuit Judge, why the receivership should not be continued during the pendency of the suit, and (2) that at that hearing "any other creditor of the defendant or other party in interest may be heard".

The receivers took possession of the properties and have since been operating them under orders made from time to time by the Senior Circuit Judge in that suit.

September 6, the Manhattan Railway Company petitioned for leave to intervene as a defendant in the Interborough receivership suit and set forth in the petition many facts showing the Manhattan's serious financial embarrassment; and alleged that it owned a substantial part of the property held and operated by the Interborough Company and included in the receivership, and that the same was held and operated by the Interborough Company under a lease from the Manhattan Company. The petition referred to and claimed the benefit of various provisions in the lease defining the obligations of the Interborough Company thereunder, and pointed out that in several particulars the Interborough had made default in the performance of its obligations and that these defaults were admitted by the Interborough's answer. The petition prayed that the Manhattan Company be made a party defendant in the receivership suit for the protection of its interests and those of its creditors; that the receivership be extended so as to embrace the interest of the Manhattan Company, but without prejudicing or impairing any of its rights against the Interborough Company or the latter's receivers, and that such receivers be required to keep separate accounts in respect of the railroads owned by the Manhattan Company. Upon the presentation of this petition the Senior Circuit Judge made an interlocutory order granting its several prayers, appointing a separate temporary receiver for the Manhattan Com-

pany and its assets, and granting the usual injunction. This order also required the parties to show cause on September 22, why the extension of the receivership to the Manhattan Company and its assets should not be continued during the pendency of the suit, and provided that upon such hearing "any other creditor of the defendant or other party in interest may be heard".

Several committees representing different groups of creditors, some of the Interborough Company and others of the Manhattan Company, were permitted to intervene and become parties, and many orders were made relating to the employment of counsel for the receivers and the conduct of the receivership.

On the return day of the rules to show cause the parties and many others in interest appeared and were heard by the Senior Circuit Judge; but Benjamin F. Johnson and Lillian Boehm, to be mentioned presently, were not among those who appeared. Both refrained from participating in the hearing or otherwise appearing in the suit. As a result of the hearing, the Senior Circuit Judge, on September 28, made an order or decree continuing the receiverships of the Interborough and Manhattan during the further pendency of the suit.

In the meantime another separate suit for the appointment of receivers of the Manhattan and Interborough companies was commenced, and that suit needs now to be described.

On September 21, Benjamin F. Johnson, a minority shareholder of the Manhattan Company, filed in the District Court an independent bill against that company and its temporary receiver, the Interborough Company and its temporary receivers, and the American Brake Shoe and Foundry Company. He sued on behalf of himself and all other shareholders in the Manhattan Company who might join; and his right to sue the Manhattan and Interborough companies and their temporary receivers was based upon an order giving him leave so to do, which was made by the District Judge sitting in the motion part of the court, notwithstanding the injunction granted by the Senior Circuit Judge when the temporary receivers were appointed. Johnson in his bill asserted a cause of action on behalf of the Manhattan Company against the Interborough Company arising out of the lease before described, and also a right to an accounting in that connection. He further asserted there was an urgent need for receivers for both companies and prayed for the appointment of separate receivers for each of

them. By his bill he also assailed the authority of the Senior Circuit judge to entertain the suit of the American Brake Shoe Company or to appoint receivers or make any order or decree therein; and asserted that all of the orders and decrees passed by that judge were those of an usurper and wholly void, (1) because there was no public interest requiring the assignment of a Circuit Judge to sit in the suit, and therefore the assignment under which the judge was acting was without lawful basis and void; (2) because the District Judges were not in disagreement, but in full accord, respecting the division of business and therefore the order of the Senior Circuit Judge respecting a division of business, whereby he directed that applications for the appointment of receivers in equity might be made to him, was without lawful basis and void; (3) because he was a designated judge within the meaning of Rule 1-a of the District Court, and under that rule could do "such work only" as might be committed to him by the Senior District Judge, and none had been so committed; and (4) because Rule 11-a of the District Court required all applications for the appointment of receivers in equity to be made to the judge assigned by the district judges to hold the motion part of the court, and "to no other judge", and not only was the Senior Circuit Judge not assigned to that part of the court but a District Judge duly assigned thereto was sitting therein at the time, and willing and ready to act upon any such application. Upon these grounds Johnson prayed that the Senior Circuit Judge's assignment to the District Court for the purpose of hearing matters in the American Brake Shoe Company's suit, his division-of-business order directing that applications for the appointing of receivers in equity might be made to him, his orders appointing temporary receivers for the Interborough Company and a temporary receiver for the Manhattan Company, and all other orders made by him in the suit, be held void and vacated.

On the same day, September 21, Lillian Boehm was given leave, by the District Judge sitting in the motion part of the court, to intervene as a party plaintiff in Johnson's suit, which she did. She was a stockholder in the Manhattan Company and a secured creditor of the Innterborough Company. In her bill of intervention she asserted there was imperative need for the appointment of a receiver to take charge of and to preserve the property of the Interborough Company, continue the operation of its railroad sys-

tem for the accommodation of the public, and collect and properly appropriate the income thereof until the final decree; assailed the orders of the Senior Circuit Judge in the American Brake Shoe Company's suit upon the same grounds that were set forth in Johnson's bill; and joined in the prayers of his bill.

Johnson and Boehm both subsequently filed petitions supplemental to their original bills and in these supplements the Senior Circuit Judge's order of September 28, continuing the Interborough and Manhattan receiverships was assailed as void upon the grounds theretofore advanced against the orders appointing temporary receivers. Thenceforth the assault was directed chiefly against the order continuing the receiverships, the orders naming temporary receivers having served their purpose and being superseded.

In their bills and supplements Johnson and Boehm also complained that the receivers appointed for the Interborough and Manhattan companies in the earlier suit of the American Brake Shoe Company had theretofore had, or then had, relations with the Interborough and Manhattan Companies and with particular groups of the creditors of one or the other of those companies which would tend to prevent them from discharging their duties impartially and with due regard to the rights of all who were parties in interest. But there was no claim that either Johnson or Boehm had presented this complaint in the suit wherein the receivers were appointed and in which they were acting.

In the Johnson suit Johnson and Boehm separately procured, from the District Judge sitting in the motion part of the court, rules requiring the defendants in that suit to show cause on October 4 why orders should not be granted vacating (1) the Senior Circuit Judge's assignment of himself to sit in the District Court to hear matters in the American Brake Shoe Company's suit, (2) his division-of-business order directing that applications for the appointment of receivers in equity might be made to him, and (3) his several orders in the American Brake Shoe Company's suit, including those appointing receivers; and why independent receivers for the Manhattan Company, and likewise for the Interborough Company, should not be appointed in the Johnson suit.

On the return day of these rules to show cause the parties appeared before the District Judge sitting in the motion part of the court, and were heard by him. At that time answers to the bills

and supplements had not been filed and as yet were not due. Affidavits were tendered by the defendants to refute the complaint questioning the personal fitness of the receivers for the service for which they were appointed. But the District Judge put this and related questions of fact to one side as being outside the scope of the hearing, which he ruled was confined to the question whether the Senior Circuit Judge could entertain the application for receivers in the suit of the American Brake Shoe Company and make the orders which were assailed.

The outcome of the hearing was that the District Judge held that the Senior Circuit Judge's assignment of himself to the District Court to hear and determine all matters in the American Brake Shoe Company's suit was void, because, even if empowered by § 22 to make a general assignment of himself to hold the District Court, he was without authority to make a selective assignment, as by designating the case which he was to hear or the part of the court in which he was to sit; that his division-of-business order was void, because under § 27 a failure of the District Judges to agree upon the division of business is a condition precedent to action on that subject by the Senior Circuit Judge, and there had been no such failure to agree; that rules 1-a and 11-a of the District Court are valid and operate to limit the jurisdiction of all judges assigned to the District Court, whether they be District Judges or Circuit Judges, and as the orders of the Senior Circuit Judge in the American Brake Shoe Company's suit were all made in contravention of those rules they were void; and that these orders could not be supported on the theory that he was a de facto judge, for he was not such but merely an intruder.[2] The District Judge accordingly passed a decree, on October 18, vacating all decrees and orders made by the Senior Circuit Judge in the American Brake Shoe Company's suit. But just before giving that decree the District Judge passed another, on his own motion and over the objection of the parties to the suit of the American Brake Shoe Company, consolidating that suit and the Johnson suit. Consolidation was ordered because, as the District Judge said, there was in his mind "a residuum of doubt" whether, so long as the suits remained separate, an order properly could be passed in the

[2]Johnson v. Manhattan Railway Company, 1 Fed. Sup. 809.

Johnson suit vacating the orders made in the other and earlier suit.

On appeals to the Circuit Court of Appeals the consolidating decree and the vacating decree were both reversed.[3] Johnson and Boehm then separately petitioned this Court for a review on certiorari and the petitions were granted.

Counsel for petitioners now assume that in granting the petitions this Court intended to review the decision of the Circuit Court of Appeals on the appeal from the consolidating decree, as well as its decision on the appeal from the vacating decree; but the assumption is without any basis. In the petitions complaint was made of the reversal of the vacating decree, but not of the reversal of the consolidating decree; and the reasons advanced to obtain a review related only to the reversal of the vacating decree. Plainly the petitions sought a review of the latter, and of it only; and obviously the review granted was not intended to be broader than that sought in the petitions.

In turning to the particular questions presented the Circuit Court of Appeals accurately and concisely observed:

"The controversy does not touch the substantial relief asked by any of the parties; all acknowledge that the two railways are in such financial straits that a court of equity must take over their assets, to prevent their dismemberment by execution, attachment and the like. The plaintiffs, and those who have intervened, [in the Johnson suit] ask for receivers, just as did the parties to the American Brake Shoe Company suit. The dispute touches merely who shall be the receivers, and who the judge to have charge of the receivership."

One question claiming attention is whether the attack made in the Johnson suit on the orders in the American Brake Shoe Company suit was direct or collateral. The suits were distinct, although directed to the same main end. Johnson purposely brought his suit as a separate and independent suit and Boehm purposely intervened in it as such. Both were invited by the orders in the other suit to appear therein and show cause, if any they had, why the temporary receivership should not be continued. Had they appeared they would have been entitled to object that the judge sitting at the time was acting without authority or in contravention of applicable court rules, and to object that the persons temporarily named as receivers were not suited to the task and ought not

[3]Johnson *v.* Manhattan Railway Company, 61 Fed. (2d) 934.

to be continued; and had the receivership been continued without giving effect to these objections they would have been entitled to appeal.[4] In thus seeking a correction of errors claimed to have been committed in continuing the receiverships they would have been engaged in a direct attack. But they chose to make the objections in a distinct receivership suit of their own, not on any recognized equitable ground, such as fraud, imposition or mistake, but on the ground of alleged error. In this they were engaged in a collateral attack. That their suit was brought in the same court where the other suit was pending did not make the attack any the less collateral.[5] Of course, under equity rule 37, they could not intervene as parties in the other suit, save "in subordination to, and in recognition of, the propriety of the main proceeding"; but this restriction put no obstacle in their way.[5a] They were not objecting to a receivership such as was sought in the other suit, but were themselves asserting its propriety upon the same grounds and to the same general end that were set up in that suit. Their objections went only to the particular judge sitting in the hearing and to the particular receivers. In these circumstances it is plain that the attack was collateral.[6] And, this being so, there was need for heeding the familiar rule that such an attack can be successful only where and to the extent that it discloses a want of power as distinguished from error in the exertion of power that was possessed.[7]

The District Judge, as shown in his opinion, was in doubt whether the attack was direct or collateral, but conceived that the doubt could be removed and the attack made direct by ordering a consolidation of the two suits, which he did on his own motion over objections by the parties to the American Brake Shoe Company suit. The order of consolidation has since been reversed by the Circuit Court of Appeals; but, quite apart from the reversal, the

[4]28 U. S. C., § 227; Christian *v.* R. Hoe & Co., 63 Fed. (2d) 218; Mitchell *v.* Lay, 48 Fed. (2d) 79, 84, 85; Kingsport Press *v.* Brief English Systems, 54 Fed. (2d) 497; Pacific Northwest Packing Co. *v.* Allen, 109 Fed. 515; Blake *v.* District Court, 59 Fed. (2d) 78.

[5]Cohen *v.* Portland Lodge, 152 Fed. 357, 359.

[5a]Central Republic Bank, etc. *v.* Caldwell, 58 Fed. (2d) 721, 729.

[6] 1 Freeman on Judgments, 5th ed., §§ 305-308, 315; Vanfleet on Collateral Attack, §§ 2, 3.

[7]Dowell *v.* Applegate, 152 U. S. 327, 337-340; Fauntleroy *v.* Lum, 210 U. S. 230, 237; Ex parte Roe, 234 U. S. 70, 72; Marin *v.* Augedahl, 247 U. S. 142, 149, 152.

consolidation did not alter the nature of the attack. Under the statute, 28 U. S. C., § 734, consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.[8]

Next in order are the questions respecting the Senior Circuit Judge's assignment of himself to sit in the District Court to hear matters in the American Brake Shoe Company suit. The statute, 28 U. S. C., § 22, provides that the Chief Justice, or the Circuit Justice of the circuit, or the Senior Circuit Judge thereof, may, "if the public interest requires", designate and assign "any circuit judge" of the circuit to hold a district court therein. The same authority to assign that is given to the Chief Justice and the Circuit Justice, respectively, is also given to the Senior Circuit Judge; and that authority is to assign "any circuit judge" of the particular circuit. There are no restrictive words. There can be no doubt that under this section the Chief Justice may assign the Senior Circuit Judge of the circuit, he being one of the Circuit Judges thereof; and equally there can be no doubt that the Circuit Justice may do the same. May the Senior Circuit Judge assign himself? The words of the section, taken literally, mean that he may do so; and only by implying restrictive words which are not there can the section be held to mean otherwise. But the real meaning is not reflected alone in the words of the section, for there are other considerations which point to the literal meaning as the true one.

Section 22 was first enacted as part of the Judicial Code, effective January 1, 1912, which abolished the old Circuit Courts and transferred their jurisdiction to the District Courts. When the proposed code was pending before the Congress differences of opinion arose over the proposed abolition of the Circuit Courts. There was opposition to this on the ground chiefly that it would take Circuit Judges out of work in which they were accustomed to participate, and as to much of which there would be reason for their continued participation. These differences led to the inclusion in the proposed code of the assignment provision now embodied in section 22. Members of the committees having the bill in charge

[8]Toledo, St. L. & K. C. R. R. Co. *v.* Continental Trust Co., 95 Fed. 497, 506; Taylor *v.* Logan Trust Co., 289 Fed. 51, 53; Nolte *v.* Hudson Navigation Co., 11 Fed. (2d) 680, 682; Mutual Life Ins. Co. *v.* Hillmon, 145 U. S. 285, 293.

and members of the conference committee to which it ultimately was referred explained in their respective Houses that the provision was intended to establish a liberal and flexible plan under which Circuit Judges could sit in the District Courts; and that under it any Circuit Judge readily could be assigned to hold a District Court within his circuit whenever occasion therefor might arise, whether from a pressure of business in a District Court, from the presence therein of particular cases of special importance, from an absence of business in the Circuit Court of Appeals, or from any other situation, if the Senior Circuit Judge, or the Circuit Justice, or the Chief Justice, deemed the assignment to be in the public interest.[9]

Since the Judicial Code went into effect it has been the practice of most of the Senior Circuit Judges to assign themselves, as well as other Circuit Judges, to sit in District Courts within their circuits whenever they deemed that the public interest required it. The practice was initiated early in 1912 by the then Senior Circuit Judge for the Second Circuit and has been followed by each of his four successors. In the other circuits the Senior Circuit Judges, with a notable exception,[10] adopted that course of action. Some of the assignments were generally to hold a District Court in a named district; others were to hold a particular division of a

[9]Congressional Record, Vol. 45, part 4, pp. 3547, 3999, 4000; Vol. 46, part 1, pp. 302, 303; Vol. 46, part 1, p. 840; Vol. 46, part 3, p. 2138; Vol. 46, part 3, pp. 4003, 4004; Vol. 46, part 4, p. 4006.

[10]Circuit Judge Walter H. Sanborn was long the Senior Circuit Judge of the Eighth Circuit and during much of that period the Justice delivering this opinion was the Circuit Justice for that circuit. The files of this Circuit Justice are the basis for the following statement:

In 1912 Judge Sanborn was requested by the other Circuit Judges in that circuit and by the District Judge who was specially concerned, to take charge of an important railroad receivership suit in one of the districts within the circuit. Judge Sanborn indicated that he would be willing to undertake the service if he were assigned thereto by the Chief Justice or the Circuit Justice, but that he was quite unwilling to assign himself to the District Court for the purpose, because such an assignment would have a personal side approaching impropriety. One of the Circuit Judges and the District Judge of the particular district then applied to the Circuit Justice to make an assignment of Judge Sanborn, which was done. Judge Sanborn's indisposition to assign himself continued; and in like circumstances he was assigned by the Circuit Justice to District Courts in that circuit on twelve different occasions in the years

District Court, or a term of such court at one of several places fixed by law; and still others were to hold a District Court to hear and determine a designated cause or causes.

Early in 1912 the Senior Circuit Judge of the Second Circuit assigned himself to sit in a District Court to hear matters arising in a specified receivership suit. While he was sitting in that suit an intervener challenged his authority to make the assignment or act under it. A hearing was had on the question, after which the judge in a considered opinion, published at the time,[11] upheld the assignment and denied the motion presenting the challenge. A review was not sought, nor was the question further agitated.

The practice of the Senior Circuit Judges here described and the decision just mentioned amounted to a practical construction of the provision in question in keeping with its literal meaning. In 1922, after that construction had prevailed and been acted on for several years, the provision was reenacted by the Congress as part of an act dealing with other assignments of judges to the District Courts.[12] The reenactment was without any change indicative of a disapproval of the prior construction by the Senior Circuit Judges. In such circumstances, as this Court often has pointed out, reenactment operates as an implied legislative approval of the prior construction—in other words, as a reenactment of the statute as before construed.[13]

It is said that § 22 gives no authority for making a selective designation, as by designating the case which the assigned judge is to hear or the part of the court in which he is to sit. To this assent cannot be given. It has no support in the words of the section, is contrary to the plain import of the legislative proceedings before noticed, and is opposed to the settled practice of the Senior Circuit Judges. Assignments to hear particular cases have been

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1912 to 1923, each assignment being limited to a particular year but otherwise general. The receiverships of the Wabash Railroad and the St. Louis & San Francisco Railroad were among the matters which came before Judge Sanborn under those assignments.

Judge Sanborn's successor as Senior Circuit Judge accepted and conformed to the general practice.

[11]Pennsylvania Steel Company *v.* New York City Ry. Co., 221 Fed. 440.

[12]Act of Sept. 14, 1922, c. 306, 42 Stat. 829.

[13]Old Colony R. R. Co. *v.* Commissioner, 284 U. S. 552, 557; McCaughn *v.* Hershey Chocolate Co., 283 U. S. 488, 493; Heald *v.* District of Columbia, 254 U. S. 20, 23.

made in all the circuits. Such an assignment was involved in *United States* v. *Gill*, 292 Fed. 136, and was sustained by the Circuit Court of Appeals for the Fourth Circuit. The earliest assignments in the Second Circuit were thus limited—not only the one assigning the Senior Circuit Judge already noticed, but also those assigning other Circuit Judges. It is easily conceivable that there may be compelling reason in the public interest to make an assignment for a particular case, or for one of several divisions of the court, or for a limited period such as thirty or sixty days. The section makes the public interest, as found by the assigning authority, the criterion. If that interest is found to require only a limited assignment, it would seem that the action taken should be limited accordingly. The succeeding section (23) requires a Circuit Judge who is assigned under § 22 to discharge all the judicial duties "for which he is so appointed, during the time for which he is so appointed". In this there is a plain implication that the assignment may be for particular duties and for a limited time.

The District Judge did not rule on the part of the attack wherein it was contended that the assignment was invalid because there was no public interest requiring it; but the Circuit Court of Appeals rejected the contention on the ground that the recital or finding in the assignment that public interest required it is conclusive in this proceeding. Plainly the Circuit Court of Appeals was right. By § 22 the decision as to a requiring public interest is left to the one having the power to assign. The duty and the responsibility are with him—as well when he is a Senior Circuit Judge as when he is the Chief Justice or a Circuit Justice. His decision that there is a requiring public interest is not open to a collateral attack such as is here presented.[14] And were it so open, no litigant could with any safety submit any matter to an assigned judge—a situation which would involve intolerable uncertainty and embarrassment to both public and private interests.

In the course of his opinion the District Judge suggested that the assault on the assignment and on the Senior Circuit Judge's authority to act under it "sounded in quo warranto", and so might possibly be regarded as being direct rather than collateral. But the suggestion was ill-grounded. Quo warranto is addressed

[14]People v. Ballard, 134 N. Y. 269, 293; People ex rel. v. Supreme Court, 220 N. Y. 487, 491; State v. Lewis, 107 N. C. 967, 977; Cocke v. Halsey, 16 Pet. 71, 87; Ex parte American Steel Barrel Co., 230 U. S. 35, 45.

to preventing a continued exercise of authority unlawfully asserted, not to a correction of what already has been done under it or to a vindication of private rights. It is an extraordinary proceeding, prerogative in nature, and in this instance could have been brought by the United States, and by it only, for there is no statute delegating to an individual the right to resort to it.[15] Besides, such a proceeding, to reach its objective in a situation like that here disclosed, must be brought against the person who is charged with exercising an office or authority without lawful right.[16] The Johnson suit was not against the judge acting under the assignment, but was wholly between others who were private litigants. So, granting that an attack in a quo warranto proceeding would have been direct, and not merely collateral, it must be held that the suit before the District Judge was not such a proceeding.

It follows from the views already expressed that there was no jurisdictional infirmity in the Senior Circuit Judge's orders in the American Brake Shoe Company suit, unless such an infirmity arose from his disregard of rules 1-a and 11-a of the District Court. His status when making the orders was that of a Circuit Judge specially assigned to and sitting in the District Court to hear and determine all applications and proceedings in the suit wherein the orders were made; and his powers and duties in that connection were just what they would have been had he been so assigned by the Chief Justice or the Circuit Justice, instead of by himself. No doubt he was under a duty to recognize and respect all valid rules of the District Court which were applicable to the proceedings before him; but he was not under a duty to give effect to rules which were either invalid or inapplicable.

One of the rules disregarded, 1-a, provides that an assigned judge shall "do such work only as may be assigned to him by the senior district judge". In this there is an attempt to invest the senior judge of the district with a discretion to determine what work an assigned judge shall do, and also an attempt to exclude him from any other work. Here the Circuit Judge was sitting in the District Court under an assignment specially designating the

[15]Wallace *v.* Anderson, 5 Wheat. 291; Territory *v.* Lockwood, 3 Wall. 236; Newman *v.* United States, ex rel., 238 U. S. 537; First National Bank *v.* Fellows, Attorney General, 244 U. S. 416, 427-428; First National Bank *v.* Missouri, 263 U. S. 640, 660-661.

[16]High on Extraordinary Legal Remedies, 3rd ed., § 604.

work which he was to do. The rule says in effect that this work could not be done by him unless the senior judge of the district approved the special designation; and it means that this judge may either approve or disapprove. In short, it attempts to give him a power of veto over the designation and thus to interfere with the work specified. By statute, 28 U. S. C., § 731, the power of the District Courts to make rules is confined to such as are "not inconsistent with any law of the United States"; and it obviously would be thus limited even without the statute.[17] Not only does § 22 authorize a special assignment such as is shown here, but § 23 requires the assigned judge to discharge the duties for which he is so assigned. It is apparent, therefore, that, as applied to such an assignment, the rule operates as an interference with the discharge of those duties and is in that regard inconsistent with sections 22 and 23 and invalid.

The other rule which was disregarded, 11-a, provides that all applications for the appointment of receivers in equity causes shall be made to the judge holding the motion part of the court, and "to no other judge". As it is sought to be applied here, this rule is subject to objections like those just assigned for condemning the application sought to be made of rule 1-a. The judge to whom the application for receivers was presented was sitting in the District Court on the equity side. Under § 22 he was specially assigned to that court to hear and determine all proceedings in the suit in which the application was made; and § 23 laid on him a duty to conform to the assignment. The rule forbids him to hear the application notwithstanding his special assignment. Thus the rule conflicts with §§ 22 and 23 and must fall.

What has been said shows that the collateral attack cannot succeed and that the decree of the Circuit Court of Appeals must be affirmed. But in the interest of right judicial administration, and to avoid any misapprehension as to what is here decided, something more needs to be said.

The possession of power is one thing, the propriety of its exercise in particular circumstances is quite a different thing. This is true of the power of a Senior Circuit Judge to assign himself to sit in a particular case in a District Court. In its very nature this power is one which should be sparingly exercised, and then only in special exigencies and with commensurate care and discretion.

[17] Washington-Southern Navigation Co. *v.* Baltimore & Philadelphia Steamboat Co., 263 U. S. 629, 635, and cases cited.

The occasions are rare in which the matter cannot be referred to the Chief Justice or the Circuit Justice and committed to his consideration and judgment. A receivership is not grantable as of course, but only for reasons strongly appealing to the judge to whom the application is made. When large properties are involved a receivership usually involves widely conflicting interests and presents questions fraught with difficulty and exceptional delicacy. This was true of the receivership here in question. It involved properties, estimated to approximate $500,000,000 in value, which were held and used by a public carrier employing thousands of persons in its work and carrying hundreds of thousands of passengers each day. The carrier was in greatly embarrassed condition, had thousands of creditors whose interests were divergent, and was confronted with possible forfeiture of some of its franchises. All this shows that the situation was one in which the assignment of a judge to take charge of the receivership, if one was to be assigned, was a task which needed to be performed upon careful consideration and with the utmost impartiality. The difference of opinion, between the Senior Circuit Judge and the District Judges, respecting the relative fitness of individuals and trust companies as equity receivers, was not a proper ground for taking the cause away from the District Judge before whom it ordinarily would come, and bringing it before the assigning Senior Circuit Judge.[18] Granting that the latter was most sincere in what he did, there was yet no compelling reason for assigning himself. Had he reflected he probably would not have made such an assignment; but he acted hastily and evidently with questionable wisdom. This action has embarrassed and is embarrassing the receivership. If he were now to withdraw from further participation in the receivership proceedings the embarrassment would be relieved; and the belief is ventured here that, on further reflection, he will recognize the propriety of so doing and, by withdrawing, will open the way for another judge with appropriate authority to conduct the further proceedings.

*Decree affirmed.*

Mr. Justice BUTLER concurs in the result.

The CHIEF Justice and Mr. Justice BRANDEIS did not hear the argument or participate in the decision.

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[18]See Appleton *v.* Smith, 1 Fed. Cas. No. 498, p. 1075; Cole Silver Mining Co. *v.* Virginia, etc. Co., 6 Fed. Cas. No. 2990, pp. 72, 74; Hadden *v.* Natchaug Silk Co., 84 Fed. 80; Harkin *v.* Brundage, 276 U. S. 36, 55.